# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 226. A. 6.

FRANCES REBECCA HAMILTON, PLAINTIFF IN ERROR,

vs.

GRACE ABBIE B. RATHBONE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 27, 1897.

(16,345.)

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No. 206.

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*vs.*

GRACE ABBIE B. RATHBONE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.



JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1897.

# In the Court of Appeals of the District of Columbia.

FRANCES REBECCA HAMILTON, Appellant,
*vs.*
GRACE ABBIE B. RATHBONE.
No. 554.

*a* Supreme Court of the District of Columbia.

GRACE ABBIE B. RATHBONE, Plaintiff,
*vs.*
FRANCES REBECCA HAMILTON, Defendant.
At Law. No. 31827*a*.

UNITED STATES OF AMERICA,
*District of Columbia.*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed June 13, 1891.

In the Supreme Court of the District of Columbia, June 13th, 1891.

GRACE ABBIE B. RATHBONE, Plaintiff,
*vs.*
FRANCIS E. HAMILTON, FRANCES REBECCA HAMILTON, & JOSEPH HAMILTON, Defendants.
At Law. No. 31827.

1st. The plaintiff sues the defendants to recover the one undivided moiety or third part, the whole into three equal parts to be divided, of and in all that certain piece and parcel of land, messuage, and appurtenances, situate in the District of Columbia, beginning on the west line of the Fourteenth Street or Piney Branch road at the northeast corner of a small part of lot numbered four of the division of the Pleasant Plains tract, which small part was sold and conveyed by Thomas J. Quinter and wife to Julia C. Buker by a deed recorded in Liber 533, fol. 67, one of the land records of the said District, and running thence with the north line of the said Buker's lot north fifty-eight and one-half degrees west thirty and one-tenth perches; thence north twenty degrees east five and forty-six one-hundredths perches; thence south

fifty-eight and one-half degrees east twenty-eight and fifty-two one-hundredths perches to the west line of said Fourteenth
2 Street or Piney Branch road, and thence with the west line of said road south five degrees west six and one-tenth perches to the place of beginning, being the same premises sold and conveyed by Thomas J. Quinter and wife to Abram Elkin, Jr., by a deed recorded in Liber 532, fol. 234, in which undivided third *undivided* part the plaintiff claims the fee-simple and of which the plaintiff was seized and possessed on the first day of March, one thousand eight hundred and eighty-five, when the defendants entered the same and unlawfully ejected the plaintiff therefrom, and have ever since detained the same from the plaintiff, and the plaintiff claims the possession of the said one undivided third part or moiety of said piece or parcel of land, messuage, and appurtenances and costs of suit.

2. And the plaintiff sues the defendants to recover the one undivided moiety or third part, the whole into three equal parts to be divided, of and in all that other certain piece or parcel of land, messuage, and appurtenances situate in the District of Columbia, beginning on the west line of the Fourteenth Street or Piney Branch road, at the northeast corner of a small part of lot numbered four of the Pleasant Plains tract, which small part was sold and conveyed by Thomas J. Quinter and wife to Julia C. Buker by deed recorded in Liber 533, fol. 67, one of the land records of said District, and running thence with the north line of said Buker's lot north fifty-eight and one-half degrees west thirty and one-tenth perches; thence north twenty degrees east five and forty-six one-hundredths perches; thence south fifty-eight and one-half degrees east twenty-eight and fifty-two one-hundredths perches to the west line of said Fourteenth Street or Piney Branch road, and thence with the west line of said road south five degrees west six and one-tenth
3 perches to the place of beginning, being the same premises sold and conveyed by Thomas J. Quinter and wife to Abram Elkin, Jr., by deed recorded in Liber 532, fol. 234, in which undivided third part the plaintiff claims the fee-simple and of which the plaintiff was lawfully seized and possessed on the first day of June, one thousand eight hundred and ninety-one, when the defendants entered the same and unlawfully ejected the plaintiff therefrom and have ever since detained the same from the plaintiff; and the plaintiff claims the possession of the said one undivided third part or moiety of said piece and parcel of land, messuage, and appurtenances, with costs of suit.

3d. And the plaintiff sues the defendants for that the defendants heretofore, to wit, on the first day of March, one thousand eight hundred and eighty-five, with force and arms broke and entered into the one undivided third part of the messuage, tenement, and appurtenances of the plaintiff, situate in the District of Columbia and beginning on the west line of the Fourteenth Street or Piney Branch road at the northeast corner of a small part of lot numbered four of the Pleasant Plains tract, which small part was sold and conveyed by Thomas J. Quinter and wife to Julia C. Buker by deed

recorded in Liber 533, fol. 67, one of the land records of said District, and running thence with the north line of said Buker's lot north fifty-eight and one-half degrees west thirty and one-tenth perches; thence north twenty-eight degrees east five and forty-six one-hundredths perches; thence south fifty-eight and one-half degrees east twenty-eight and fifty-two one-hundredths perches to the west line of said Fourteenth Street or Piney Branch road, and thence south
4 five degrees west six and one-tenth perches to the place of beginning, being the same premises sold and conveyed by Thomas J. Quinter and wife to Abram Elkin, Jr., by deed recorded in Liber 532, fol. 234, one of the land records of said District, and expelled, put out, and removed the plaintiff from her possession and occupation of the said undivided one-third part of said messuage, tenement, and appurtenances, and kept and continued her so expelled and removed for a long time, to wit, from the day and year aforesaid, and from thence hitherto and during all that time did receive to their own use all the issues and profits and the beneficial use and occupation of the said undivided one-third part of said messuage, tenement, and appurtenances, being of great value, to wit, of the monthly value of fifteen dollars, and whereby the plaintiff was deprived and kept from using, renting, and selling the same. Wherefore the plaintiff claims the sum of three thousand dollars besides costs of suit.

4th. And the plaintiff sues the defendants for that the defendants heretofore, to wit, on the first day of June, one thousand eight hundred and ninety-one, with force and arms broke and entered into that other one undivided third part of the messuage, tenement, and appurtenances of the plaintiff situate in the District of Columbia and beginning on the west line of the Fourteenth Street or Piney Branch road at the northeast corner of a small part of lot numbered four of the Pleasant Plains tract, which small part was sold and conveyed by Thomas J. Quinter and wife to Julia C. Buker by deed recorded in Liber 533, fol. 67, one of the land records of said District, and running thence with the north line of said Buker's lot north fifty-eight and one-half degrees west thirty and one-
5 tenth perches; thence north twenty-eight degrees east five and forty-six one-hundredth- perches; thence south fifty-eight and one-half degrees east twenty-eight and fifty-two one-hundredth-perches to the west line of said Fourteenth Street or Piney Branch road, and thence south five degrees west six and one-tenth perches to the place of beginning, being the same premises sold and conveyed by Thomas J. Quinter and wife to Abram Elkin, Jr., by deed recorded in Liber 532, fol. 234, one of the land records of said District, and expelled, put out, and removed the plaintiff from her possession and occupation of said undivided one-third part of said messuage, tenement, and appurtenances, and kept and continued her so expelled and removed for a long time, to wit, from the day and year aforesaid, and from thence hitherto and during all that time did take and receive to their own use all the issues and profits and the beneficial use and occupation of the said undivided one-third part of the said messuage, tenement, and appurtenances, being of

great value, to wit, of the monthly value of fifteen dollars, and whereby the plaintiff was deprived and kept from using, renting, and selling the same. Wherefor- the plaintiff claims the sum of three thousand dollars besides costs of suit.

H. G. MILANS,
*Attorney for Plaintiff.*

*Notice to Plead, &c.*

The defendants are to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

H. G. MILANS,
*Att'y for Pl'ff.*

6 *Plea for Defendants.*

Filed July 2, 1891.

In the Supreme Court of the District of Columbia, the Second Day of July, 1891.

GRACE ABBIE B. RATHBONE, Plaintiff,
*vs.*
FRANCIS E. HAMILTON, FRANCES REBECCA Hamilton, and Joseph Hamilton, Defendants. } At Law. No. 31827.

Now come the defendants and for plea to the plaintiff's declaration say they are not guilty as alleged.

A. A. LIPSCOMB,
*Att'y for Defendants.*

*Joinder of Issue.*

Filed July 3, 1891.

In the Supreme Court of the District of Columbia, the Third Day of July, 1891.

GRACE ABBIE B. RATHBONE, Plaintiff,
*vs.*
FRANCIS E. HAMILTON, FRANCES REBECCA Hamilton, and Joseph Hamilton, Defendants. } At Law. No. 31827.

The plaintiff joins issue upon the defendants' plea filed
7 July 2d, 1891.

H. G. MILANS,
*Attorney for the Plaintiff.*

*Nolle Prosequi as to 2 Def'ts and 2 Counts.*

Filed January 12, 1894.

In the Supreme Court of the District of Columbia.

GRACE A. B. RATHBONE
*vs.*
FRANCIS E. HAMILTON, FRANCES R. HAMILTON, & JOSEPH HAMILTON. } At Law. No. 31827.

And now comes the plaintiff, by her attorney, Henry G. Milans, and says that she enters a *nolle prosequi* in this action as to the defendants Francis E. Hamilton and Joseph Hamilton, and will not further prosecute her suit against said defendants; and also further says that as to the third and fourth counts of the plaintiff's declaration, in which she claims to recover *mesne profits*, she also enters a *nolle prosequi* and will not further prosecute her said action against any of said defendants.

HENRY G. MILANS,
*Attorney for Plaintiff.*

8 MONDAY, *November* 25, 1895.

Session resumed pursuant to adjournment, Mr. Justice McComas presiding.

GRACE ABBIE B. RATHBONE, Plaintiff,
*v.*
FRANCES REBECCA HAMILTON, Def't. } At Law. No. 31827.

Upon hearing the plaintiff's motion for judgment upon the verdict rendered in the above-entitled case on the 19th day of November, 1895, it is considered that said motion be granted. Therefore it is considered that the plaintiff recover against said defendant possession of the one undivided moiety or third part, the whole into three equal parts to be divided, of and in all that certain piece and parcel of land, messuage, and appurtenances, situate in the District of Columbia, beginning on the west line of the Fourteenth Street or Piney Branch road, at the northeast corner of a small part of lot numbered four of the division of the Pleasant Plains tract, which small part was sold and conveyed by Thomas J. Quinter and wife to Julia C. Buker by a deed recorded in Liber 533, fol. 67, one of the land records of the said District, and running thence with the north line of the said Buker's lot north fifty-eight and one-half degrees west thirty and one-tenth perches; thence north twenty degrees east five and forty-six one-hundredth- perches; thence south fifty-eight and one-half degrees east twenty-eight and fifty-two one-hundredth- perches to the west line of said Fourteenth Street or

Piney Branch road, and thence with the west line of said
9 road south five degrees west six and one-tenth perches to the place of beginning, together with her costs of suit, to be taxed by the clerk, and have execution thereof.

*Order for Appeal.*

Filed November 29, 1895.

In the Supreme Court of the District of Columbia, the 29 Day of November, 1895.

GRACE ABBIE B. RATHBONE
*vs.*
FRANCES REBECCA HAMILTON. } At Law. No. 31827.

The clerk of said court will please enter an appeal on behalf of the defendant from the judgment in the above-entitled cause and issue a citation to the plaintiff.

A. S. WORTHINGTON,
A. A. LIPSCOMB,
*Attorneys for Defendant.*

10 In the Supreme Court of the District of Columbia.

GRACE ABBIE B. RATHBONE
*vs.*
FRANCES REBECCA HAMILTON. } At Law. No. 31827.

The President of the United States to Grace Abbie B. Rathbone, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 29th day of November, 1895, wherein Frances Rebecca Hamilton is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 29th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 29th day of November, 1895.

HENRY G. MILANS,
*Attorney for Appellee.*

11 *Memorandum.*

December 6, 1895.—Bond for appeal filed.

*Memorandum.*

January 6, 1896.—October term, 1895, prolonged to settle bill of exceptions.

WEDNESDAY, *February* 5, 1896.

Session resumed pursuant to adjournment, Mr. Justice McComas presiding.

* * * * * * *

GRACE A. B. RATHBONE
*v.*
FRANCES R. HAMILTON. } At Law. No. 31827.

Now comes here the defendant, by her attorneys, and tenders to the court here her bill of exceptions taken during the trial of this cause and prays that it may be duly signed, sealed, and made part of the record now for then; which is done accordingly.

12 *Bill of Exceptions.*

Filed February 5, 1896.

In the Supreme Court of the District of Columbia.

GRACE A. B. RATHBONE
*vs.*
FRANCES R. HAMILTON. } At Law. No. 31827.

Be it remembered that this cause came on to be tried before Honorable Louis E. McComas, justice, and a jury on the 13th day of November, A. D. 1895; whereupon the plaintiff, to maintain the issues on her part joined, called as a witness the defendant, FRANCES R. HAMILTON, who, being duly sworn, testified in substance as follows:

I reside on 14th street extended, on the property in dispute, and have been in possession of it for sixteen years, and am in possession of it now.

Q. On what claim of title did you go into possession?

A. I went in under all claim of title. I bought it and paid for it, as I thought.

Q. Who did you buy the property from?

A. From Mr. Calvert.

Q. You got a deed from him?

A. Yes; it was supposed he could give a deed.

Q. You went into possession under that deed?

A. Yes, sir; I went into possession under all deeds.

On cross-examination the witness testified as follows:

Q. Do you mean to say you claim title to that property only under that deed?

13 A. No, sir; I claim title to all deeds. I bought it and paid for it. I ought to have got a rightful title, if I didn't.

Q. You do not limit your claim of title to that deed, then?

A. No; not exactly.

Redirect examination:

Q. What other claim of title have you got besides the deed from Calvert?

A. The claim of title that I paid my money for it. I paid cash money.

Recross-examination:

I made the money in the milk business. I employed a lawyer and paid my money on the faith of what he told me, and I never got any of the money back.

Counsel for the plaintiff thereupon offered in evidence, for the sole purpose of showing a common source of title, the following deed, to wit:

| | | |
|---|---|---|
| Ex'd. Del. to J. M. C. Carusi M'ch 21, 1879. R. R. | Fred'k G. Calvert, ex'r, to Frances Rebecca Hamilton. | Recorded Feb. 20, 1879, 1 p. m. Deed. |

This indenture made this 20th day of February, in the year of our Lord eighteen hundred and seventy-nine between Frederick G. Calvert, executor of the city of Washington, District of Columbia, of the first part, and Frances Rebecca Hamilton, of the same place, of the second part, witnesseth.

14 Whereas Lucy Victoria Elkin, deceased, late of said city and District, by her last will and testament bearing date on the 22nd day of April, A. D. 1876, duly proved and admitted to record in the supreme court of the District of Columbia holding a special term, directed the real estate personal and mixed property, owned and held by her to be sold and after deducting her funeral and other necessary expenses to pay the legacies as therein provided out of the proceeds of said sale, constituting Frederick G. Calvert sole executor, as will more fully and at large appear by reference to said last will and testament on file in said supreme court, and recorded among the records of said — in Will Book No. 15 folio 349 and to which reference is hereby made.

Now, therefore this indenture witnesseth that said party of the first part executor as aforesaid for and in consideration of the premises and further the sum of fifteen hundred dollars in lawful money of the United States to him in hand paid by the said party of the second part at and before the sealing and delivery of the- presents the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, enfeoffed, released and conveyed, and does by these

presents grant bargain sell alien enfeoff release and convey unto the said party of the second part her heirs and assigns forever the following-described real estate situate lying and being in the county of Washington District of Columbia and known as a part of a tract of land called Pleasant Plains and beginning for the same on the west side of Fourteenth Street road at the northeast corner of a part of the same tract heretofore sold and conveyed by Thomas J. Quinter to Julia C. Baker and running thence with said Baker's line north
fifty-eight and one-half degrees west thirty and ten-hundredths
15 perches (N. 58½° west 30.10 pcs.) thence north twenty degrees east five and forty-six hundredths perches (N. 20° E. 5.46 prs.) thence south fifty-eight and one-half degrees east twenty-eight and fifty-two hundredths perches (S. 58½° E. 28.52 prs.) thence south five degrees west six and one-tenth perches (S. 5° W. 6.1 prs.) to the place of beginning containing one acre of ground; the ground hereby intended to be conveyed by the above-described being the whole of said land that was conveyed to Abram Elkin Jr., by Thos. J. Quinter and wife by deed bearing date July 31, A. D. 1867 and recorded in Liber E. C. E. 8 folio 234 *et seq.*, one of the land records of the county of Washington and District of Columbia, together with all the improvements, ways, easements, rights, privileges appurtenances and hereditaments to the same belonging or in anywise appertaining and all the remainders, reversions, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever either at law or in equity of the said party of the first part, of, in, to or out of the said piece or parcel of land and premises. To have and to hold the said piece or parcel of land and premises with the appurtenances, unto the said party of the second part her heirs and assigns to her sole use, benefit and behoff forever. And the said party of the first part for himself and his heirs, shall and will at any and at all times hereafter upon the request and at the cost of the said party of the second part her heirs and assigns make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of
the said piece or parcel of land and premises and appurte-
16 nances unto the said party of the second part her heirs or assigns as the said party of the second part her heirs or assigns or her counsel learned in the law shall advise devise or require.

In testimony whereof the said party of the first part has hereunto set his hand and seal on the day and year first hereinbefore written.

FRED. G. CALVERT, *Executor.* [SEAL.]

Signed, sealed, and delivered in the presence of—
CHAS. W. HANDY.

DISTRICT OF COLUMBIA, }
*Washington County,* } *ss:*

I. Charles W. Handy, a notary public in and for the District and county aforesaid, do hereby certify that Frederick G. Calvert, party to a certain deed bearing date on the twentieth day of February, A. D.

1879, and hereto annexed, personally appeared before me in said county, and the said Frederick G. Calvert being personally well known to me to be the person who executed said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this twentieth day of February, A. D. 1879.

CHAS. W. HANDY, [NOTARIAL SEAL.]
*Notary Public.*

The plaintiff, further to maintain the issues on her part
17 joined, offered in evidence, for the sole purpose of showing that the plaintiff and the defendant claim title from the same common source, the record of the paper purporting to be the last will and testament of Lucy V. Elkin, as follows:

In the name of God, amen.

I, Lucy Victoria Elkin, being weak in body, but of a sound and disposing mind, do make this my last will and testament hereby revoking all others heretofore made by me.

I first direct that the real estate, and personal and mixed property now owned and held by me sold, and after deducting my funeral and other necessary expenses I give and bequeath to my dear husband Abram Elkin, the sum of one thousand ($1,000) dollars out of the proceeds of said sale.

I, then direct that the remaining portion of the money received from said sale be divided in equal shares between my children, viz: Grace Abby Blanche, Lucy Caroline, Charles Calvert, and Harry Lowry Elkin, and I do hereby constitute and appoint Fred. G. Calvert my sole executor of this my last will and testament.

In witness whereof, I hereunto subscribe my name this twenty-second day of April in the year of our Lord A. D. one thousand eight hundred and seventy-six.

LUCY VICTORIA ELKIN.

We hereby certify that the above is the signature of Lucy Victoria Elkin, who, in our presence, we being in the presence of each other, and after having said paper read and explained to her, signed and acknowledged the same to be her act and deed, and requested
us to witness the same this twenty-second day of April, in
18 the year of our Lord one thousand eight hundred and seventy-six.

CHARLES CALVERT.
MARY J. LOWRY.
ELIZABETH R. RILEY.

The plaintiff further offered in evidence the bond of the executor, Frederick G. Calvert, for the purpose of showing that he duly qualified, as follows:

In the Supreme Court of the District of Columbia, Holding a Special Term.

DISTRICT OF COLUMBIA, *County of Washington,* } *To wit:*

Know all men by these presents that we, Fred. G. Calvert, Charles Calvert, and Grace M. Hurdle, of Washington county aforesaid, are held and firmly bound unto the United States of America in the full sum of one hundred dollars, current money of said United States, to be paid to the said United States, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators in and for the whole, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

19 Whereas the above-bounden Fred. G. Calvert is about taking out from the supreme court of the District of Columbia letters testamentary on the personal estate of Lucy V. Elkin, late of Washington county aforesaid, deceased:

The condition of the above obligation is such that if the above-bounden Fred. G. Calvert shall well and truly perform the office of executor of Lucy V. Elkin, late of Washington county aforesaid, deceased, according to law, and shall in all respects discharge the duties of him required by law as executor aforesaid without any injury to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

FRED. G. CALVERT. [L. S.]
CHAS. CALVERT. [L. S.]
GRACE M. HURDLE. [L. S.]

Signed and sealed in the presence of—
A. WEBSTER.

Approved by the court:
A. B. OLIN.

Test: A. WEBSTER,
*Register of Wills.*

DISTRICT OF COLUMBIA, *Washington County,* } *To wit:*

I do solemnly swear that I will well and truly administer the goods, chattels, and personal estate of Lucy V. Elkin, late of
20 Washington county, in the District of Columbia, deceased; will give a just and true account of my administration when thereto I shall be lawfully called, so help me God.

FRED. G. CALVERT, *Executor.*

Sworn and subscribed before me this 8th day of June, A. D. 1876.

Test: A. WEBSTER.
*Register of Wills.*

The plaintiff further offered in evidence the record of a deed from Frederick G. Calvert to Lucy V. Elkin, as follows:

| | | |
|---|---|---|
| Ex. Del. to A. Elkin April 24, '76. R. R. | F. G. Calvert *et ux.* to Lucy V. Elkin. | Recorded May 7, 1872, 12 m. Deed. |

This indenture made this twenty-ninth day of April in the year of our Lord one thousand eight hundred and seventy-two between Frederick G. and Fannie M. Calvert his wife, of the city and county of Washington, in the District of Columbia, of the first part and Lucy V. Elkin of the same city and county of the second part.

Witnesseth that the said party of the first part for and in
21 consideration of the sum of five dollars in lawful money of the United States to them in hand paid by the said party of the second part, at and before the said sealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold aliened enfeoffed released and conveyed and do by these presents grant bargain sell alien, enfeoff, release and convey unto her the said party of the second part her heirs and assigns forever, all that certain piece or parcel of land situate and being in the said county of Washington, and being part of a tract of land called Pleasant Plains, and beginning for the part hereby intended to be conveyed on the west side of Fourteenth Street road, running thence with said Baker's line north forty-eight and one-half degrees west thirty and ten-hundredths perches (N. 58½° W. 30.10 prs.) thence north twenty degrees east five and forty-six hundredths perches (N. 20° E. 5.46 prs.) thence south fifty-eight and one-half degrees east twenty-eight and fifty-two hundredths perches (S. 58½° E. 28.52 prs.) and thence south five degrees west six and ten-hundredths perches (S. 5° W. 6.10 prs.) to the beginning containing one acre of land as shown and described in the annexed plat thereof: Together with all the improvements, ways, easements rights privileges and appurtenances to the same belonging or in anywise appertaining and all the remainders reversions rents issues and profits thereof and all the estate right title interest claim and demand whatsoever whether at law or in equity of the said parties of the first part of in to or out of the said piece or parcel of land and premises. To have and to hold the said piece or parcel of land and premises with the appurtenances unto the said party of the second part, her heirs and assigns to and for her and their
22 sole use benefit and behoof forever. And the said parties of the first part for themselves their heirs executors and administrators do hereby covenant promise and agree to and with the said party of the second part her heirs and assigns that the said parties of the first part and their heirs shall and will warrant and forever defend the said piece or parcel of land and premises with the appurtenances unto the said party of the second part her heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof by from under or through him the said party hereto of the first part, and against all persons whomsoever.

And further that the said party of the first part and his heirs shall and will at any and at all times hereafter upon the request and at the cost of the said party of the second part her heirs or assigns make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said piece or parcel of land and premises and appurtenances unto the said party of the second part her heirs or assigns that the said party of the second part, her heirs or assigns or her counsel learned in the law shall advise, devise or require.

In testimony whereof the said party of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

FREDERICK G. CALVERT. [SEAL.]
FANNIE M. CALVERT. [SEAL.]

Signed, sealed, and delivered in the presence of—having been first duly stamped—
T. DRURY.

23 DISTRICT OF COLUMBIA, } ss:
*County of Washington,* }

I, T. Drury, a justice of the peace in and for the county aforesaid, do hereby certify that Frederick G. Calvert and his wife, Fannie M. Calvert, parties to a certain deed bearing date on the twenty-ninth day of April, A. D. 1872, and hereto annexed, personally appeared before me in the county aforesaid, the said Frederick G. Calvert and his wife, Fannie M. Calvert, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed, and the said Fannie M. Calvert, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this 29th day of April, A. D. 1872.

T. DRURY, *J. P.* [SEAL.]

The plaintiff further offered in evidence the record of a deed from Abram Elkin to Frederick G. Calvert, as follows:

Ex. Del. to A. Elkins April 24, '76. | Abram Elkin *et ux.* to Fred. G. Calvert. | Deed. Recorded May 7, 1872, 12 m.

This indenture made this twenty-ninth day of April in the year of our Lord one thousand eight hundred and seventy-two
24 between Abram and Lucy V. Elkin, his wife of the city and county of Washington in the District of Columbia of the first part and Fred. G. Calvert of the same city and county of the second part witnesseth: That the said parties of the first part for and in consideration of the sum of five dollars in lawful money of

the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold aliened enfeoffed released and conveyed and do by these presents grant bargain sell alien enfeoff and convey unto the said party of the second part his heirs and assigns forever all that certain piece or parcel of land situate and being in the said county of Washington and being part of a tract of land called "Pleasant Plains" and beginning for the part hereby intended to be conveyed on the west side of Fourteenth Street road running thence with Baker's line north fifty-eight and one-half degrees west thirty and ten-*p*undredths perches, (N. 58½° W. 30.10 prs.) thence north twenty degrees east five and forty-six hundredths perches (N. 20° E. 5.46 prs.) thence south fifty-eight and one-half degrees east twenty-eight and fifty-two hundredths perches (S. 58½° E. 28.52 prs.) and thence south five degrees west six and one-tenth perches (S. 5° W. 6.1*0* perches) to the beginning, containing one acre of land as shown & described in the annexed plat thereof. Together with all the improvements ways easements rights privileges and appurtenances to the same belonging or in anywise appertaining and all the remainders reversions rents issues and profits thereof and all the estate right title interest claim and demand whatsoever whether at law or in equity of the said parties of the first part of in to or out of the said, piece or parcel of land and premises. To have and to hold the said piece or parcel of land and premises with the appurtenances unto the said party of the second part his heirs and assigns to and for his and their sole use benefit and behoof forever. And the said parties hereto of the first part for themselves their heirs executors and administrators do hereby covenant promise and agree to and with the said party of the second part, his heirs and assigns, that they the said parties of the first part and their heirs shall and will warrant and forever defend the said piece or parcel of land and premises with the appurtenances unto the said party of the second part his heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof by from under or through them the said parties of the first part, and against all persons whomsoever. And further that the said parties of the first part and their heirs shall and will at any and at all times hereafter upon the request and at the cost of the said party of the second part his heirs or assigns make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said piece or parcel of land and premises and appurtenances unto the said party of the second part his heirs and assigns as the said party of the second part his heirs or assigns or his counsel learned in the law shall advise, devise or require.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ABRAM ELKIN, JR. [L. S.]
LUCY V. ELKIN. [L. S.]

26 Signed, sealed, and delivered in the presence of, having been first duly stamped—
T. DRURY.

DISTRICT OF COLUMBIA, }
*County of Washington*, } ss:

I, T. Drury, a justice of the peace in and for the county aforesaid, do hereby certify that Abram Elkin, Jr., and his wife, Lucy V. Elkin, parties to a certain deed bearing date on the twenty-ninth day of April, A. D. 1872, and hereto annexed, personally appeared before me in the county aforesaid, the said Abram Elkin and Lucy V., his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Lucy V. Elkin, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this 29th day of April, A. D. 1872.

T. DRURY, *J. P.* [SEAL.]

The plaintiff, further to maintain the issues on her part joined, appeared as a witness on her own behalf and, being duly sworn, testified as follows:

My name is Grace A. B. Rathbone. My father was Abram Elkin. My mother was Lucy Victoria Elkin. My mother died May
27 3, 1876. I was born March 11, 1864. I was 12 years old when my mother died. I had a sister, Lucy Caroline Elkin, who was born September 3, 1867. I was the oldest child. After me came Lucy Caroline. The next child was Charles Calvert Elkin, born January 2, 1870. The next was Harry Lowry Elkin, born July 15, 1875. Only one of the children besides myself is now living, and that is Charles Calvin Elkin. Harry Lowry Elkin died February 2, 1885. Lucy died in March, 1892. Harry was between 9 and 10 years of age at his death. Lucy was 22 years old when she died. The land in dispute is on the west side of the Fourteenth Street road, a square or two beyond the terminus of the Fourteenth Street cars. I lived on the property for several years when I was a little girl. I saw my father last in June, 1876, after my mother's death. I had a talk with him then. I have never seen him since, and have never heard from him. I have inquired to ascertain his whereabouts. I have written to his father. The latter sent word that he knew nothing of him. My lawyers have inquired for him. My father had no brothers or sisters, and I never knew of any uncles or aunts of his. My father's father was living when I wrote him about a year ago. I don't know whether my father is living or dead.

On cross-examination the witness stated:
After my mother's death I lived with my Grandfather Calvert;

his name was Charles Calvert. I was with him when he died, in 1880. Afterwards I lived with his daughter, Mrs. Lowry, until I was married. We were all at grandfather's house
28 when my mother died. We remained there and when he died my aunt moved, and I still stayed with her. At that time Mrs. Lowry's husband was dead. I know Mr. Calvert, my mother's brother. I never lived with him. He lived on 20th street when I lived with Mrs. Lowry.

Q. During all these year- who supported you?

A. I had to take what I could get most of the time. Some of the time I was told to go to him and I went to him. I was usually sent away without getting a thing. I had to beg for what I wanted. Once in a while I got things from him. I never got anything much. I was married November 7, 1888. My husband is employed in a private pension office.

The plaintiff further offered as a witness KATE ELLIS, who, being duly sworn, testified as follows:

I live in Baltimore. I knew Abram Elkin and Mrs. Elkin. I was present at their marriage, on April 15, 1863, by the Rev. Dr. Sunderland, in Washington, D. C. I was raised in Mr. Charles Calvert's family. I was not related to the family. They raised me since I was six years old. I left the family in 1873, when I married. I attended Mrs. Elkin's funeral. Mr. Elkin was there. I saw him last on June 17, 1876. Prior to that time he frequently came to my house. I never saw him after June 17, 1876, and never heard from him. I inquired as to his whereabouts. No member of his family, to my knowledge, ever heard from him. I inquired as to his whereabouts by letter and postal and received the following answer:

"DEAR SIR: No person by the name you mention has re-
29 sided in this city for thirty years. The Calverts, of Washington, can perhaps inform you. If it should be the one I knew, he is not worth looking at.

Yours, S. ELKIN."

The gentleman who wrote that letter was Solomon Elkin, Abram Elkin's father.

The plaintiff next called as a witness FRANCES REBECCA HAMILTON, the defendant, who, being duly sworn, testified—

That she went into possession of the property in 1879; that she never saw Mr. Elkin since 1879 and not for two or three years before that. He was never out to the property after I bought it. He has never asserted any claim of title to the property, so far as I know, and never paid any taxes on it. I was in possession of this property at the time this suit was brought, in 1891.

Q. Did you at that time intend to retain possession of it?

A. If I could keep it, but I did not want to go into law. I bought the place and paid for it and expected to get a rightful title to it. I

paid the taxes on the property for the sixteen years that I have been there.

And counsel for the plaintiff thereupon announced their case closed.

And the defendant, to maintain the issues on her part joined, called as a witness FRED. G. CALVERT, who, being duly sworn, testified as follows:

30 I have lived in Washington for about 15 years. I am the brother of Lucy Elkin. She was brought up at my father's house on 19th street. After my father died my sister moved away and took the plaintiff with her. I knew Mr. and Mrs. Elkin during their married life. They lived at Mount Pleasant. I saw them occasionally. I knew when it was purchased from Mrs. Quinter.

Counsel for the plaintiff, with the consent of counsel for the defendant, here offered in evidence deed from Thomas J. Quinter *et ux.* to Abram Elkin, as follows:

| | | |
|---|---|---|
| Ex. D'd grantee Aug. 16, 1867. | Thomas J. Quinter *et ux.* to Abram Elkin, Jr. | Deed. Recorded Aug. 1, 1867. |

This indenture made this thirty-first day of July in the year of our Lord one thousand eight hundred and sixty-seven between Thomas J. Quinter and Ada A. Quinter (late Holmead) his wife, of the city and county of Washington in the District of Columbia of the first part and Abram Elkin, Junior of the same city and county of the second part witnesseth that the said parties of the first part for and in consideration of the sum of twelve hundred dollars in lawful money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, and sold aliened enfeoffed, released and conveyed and do by these presents grant bargain and sell alien enfeoff release and convey unto the said party of the second part, his heirs and assigns forever all that certain piece or parcel of land situate and being in the said county
31 of Washington and being part of a tract of land called Pleasant Plains and beginning for the parcel hereby intended to be conveyed on the west side of the Fourteenth Street road at the northeast corner of a part of the same tract recently sold and conveyed by said parties hereto of the first part to Julia C. Baker and running thence with said Baker's line north fifty-eight and one-half degrees west thirty and ten-hundredths perches (N. 58½ W. 30.10 pr.) thence north twenty degrees east five and forty-six hundredths perches (N. 20° E. 5.46 pr.) thence south fifty-eight and one-half degrees east twenty-eight and fifty-two hundredths perches (S. 58½° E. 28.52 —) and thence south five degrees west six and one-tenth perches (S. 5 W. 6.1 pr.) to the beginning, containing one acre of land as shown and described in the annexed plat thereof the same

being part of the land allotted to said Ada A. Quinter in the division of the estate of her deceased father, William Holmead: Together with all the improvements ways easements rights privileges and appurtenances to the same belonging or in anywise appertaining and all the remainders reversions rents issues and profits thereof, and all the estate right title interest claim and demand either at law or in equity or otherwise however of the said party of the first part, of, in, to or out of the said piece or parcel of land and premises to have and to hold the said piece and parcel of land and premises and appurtenances unto the said party of the second part his heirs and assigns to and for his and their sole use benefit and behoof forever. And the said parties hereto of the first part for themselves, their heirs executors and administrators do hereby covenant promise and agree to and with the said party of the second part, his
32 heirs and assigns that they the said parties of the first part and their heirs shall and will warrant and forever defend the said land and premises and appurtenances unto the said party of the second part his heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof by from under or through them the said parties hereto of the first part and against all persons whomsoever and further that they the said parties of the first part and their heirs shall and will at any and at all times hereafter upon the request and at the cost of the said party of the second part his heirs and assigns make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said piece or parcel of land and premises and appurtenances unto the said party of the second part, his heirs or assigns as the said party of the second part, his heirs or assigns or his or their counsel learned in the law shall advise, devise or require.

In testimony whereof the said parties of the first part have hereunto set *his* hands and seals the day and year first hereinbefore written.

THOMAS J. QUINTER. [SEAL.]
ADA A. QUINTER. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOHN D. BLOOR.
JOHN S. HOLLINGSHEAD.

33 DISTRICT OF COLUMBIA, } 88:
*County of Washington,* }

I, John S. Hollingshead, a notary public in and for the county aforesaid, in the said District of Columbia, do hereby certify that Thomas J. Quinter and Ada A. Quinter, his wife, parties to a certain deed bearing date on the — day of ——, A. D. 1867, and hereto annexed, personally appeared before me, in the county aforesaid, the said Thomas J. Quinter and Ada A. Quinter, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed;

and the said Ada A. Quinter, the wife of the said Thomas J. Quinter, being examined by me privily and apart from her husband and having the deed aforesaid fully explained to her, she acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this thirty-first day of July, A. D. 1867.

JOHN S. HOLLINGSHEAD,
[NOTARIAL SEAL.] *Notary Public.*

Plat attached.

The witness thereupon proceeded to testify as follows: I was the executor of my sister's will and directed to sell her real estate. I sold it to the defendant for $1,500.00. She paid me the money, and I used it for the support of the children. I gave some of it to Mr. Elkin. He came to me and
34 wanted to borrow some money, and said that he was not willing to wait for the thousand dollars. I gave him something over $200.00. This was before the sale was made. This was shortly after the death and burial of his wife. He said his wife had given him money towards paying for the property; that he wanted to get something to get out of town. I used the proceeds of the sale in buying clothing for the children, in paying board, &c. I bought dresses and clothing for the plaintiff and took receipts in a great many instances. The witness thereupon produced receipts for money expended for the children of Abram Elkin, Jr., amounting to $598.70, and proceeded as follows: She knew that I sold the property. I have no doubt she did. She told me that she knew I had sold the property. She asked me for what she was entitled to. When she came to me for clothing and necessaries she told me that I had sold the property and she wanted the clothes to wear, or words to that effect. She knew that I had sold the property, and that she was entitled to money *nor* clothing, and in pursuance of such rights I made these payments for her that are evidenced by these bills. I never had any money upon which the plaintiff had any claim except this. My sister's funeral expenses were paid by me. While the plaintiff was living with Mrs. Lowry I frequently gave her money towards paying her board. When Abram Elkin married my sister he was a Government clerk in the Treasury Department; after leaving there he sold peanuts on the street for over a year; after that he had no business. He conveyed this property to his wife through me in 1872. He was neglecting his family there, and people were coming to him with bills. He said he wanted to make the property over to his wife. That
35 she had helped him to pay for it or given what money she had. He wanted to make the property over to his wife so that they could not touch it, or something like that. Mrs. Elkin had some money that Mr. Elkin's father had sent her at different times, and she had accumulated some little money by do

ing fancy work. He was after her frequently to turn that money over — him to help pay for the house, and she did it. She had spoken to me several times long before the property was deeded over. Mr. Elkin and his wife were living at Mount Pleasant and he was neglecting her. I went out there in a carriage and took her to my father's house, where she died. I saw Elkin after his wife's death. I saw him once at his house. He had three or four junk-dealers out there and was selling off the furniture and clothing and things of that kind. I took the plaintiff out there with me. She wanted some clothing of her mother's, but she said her father would not give it to her. He had a dress and a pair of shoes and some things that belonged to the children. I made him give them to the plaintiff. He was selling the children's clothing. I saw him three or four times after that within two or three weeks. I afterwards went out to the house in Mt. Pleasant and saw a note in Elkin's handwriting, in which it was stated, "Good-bye, Fred. I am going to leave town and not come back." I never saw him after that. I have tried to find out where he went. I wrote to different places. I wrote his father and tried to find out his whereabouts, but could not do it. Probably three or four years ago a friend of mine said he had been out to Chicago and saw him clerking in a shoe store.

36 I wrote to the postmaster in Chicago to find out whether he was there. I got a negative answer that it was not him. I heard that Abram Elkin at one time had been in the navy. At the time he left his children were at my father's house. He never asked for his children and never asked to live at that house. I do not know that he had any home at all anywhere after his wife's death except at Mount Pleasant. I have heard *the* Abram Elkin's parents were not living together; he told me that his father had left his mother. His mother visited my father's house on two or three occasions. She said she was stopping in Washington and did not expect to go to Philadelphia, but was going to New York or some other place. Elkin said nothing to me except that he was going to leave town. My sister told me that Mr. Elkin's father has sent her money. She said that her husband would sometimes get her letters and take the money out, and she had to go to work when she received mail that had any money in it and put it in her stocking.

On cross-examination the witness testified:

I received $1,500.00 for this house. I cannot state how much of it I spent; I cannot tell how much more than $598.00 I spent. I never filed an account in the orphans' court as executor; I never paid Elkin any money after the sale; I never saw him after the sale. I do not think I heard from him after he left town, shortly after his wife's death. I made this inquiry of the Chicago post-master two or three years after he left town. I do not recollect whether I tried to find out where he was after the sale or not.

37 After her mother's death the plaintiff went to live at my father's house. My father died in 1880. After he died she lived with Mrs. Lowry.

Q. After the year 1881 did you ever pay Mrs. Rathbone out of any funds in your hands any money she was entitled to?

A. I cannot remember the date. In 1881 I filed a bill in equity, in which I stated that the Elkin children were without means of support. I do not know whether I had any money of theirs in 1881 or not. After Elkin departed, in 1876, I took possession of the property in dispute. I put a man there at a small figure to take care of the place, but afterwards had to put him out. Then I paid a man to take care of the property. I got $10 from one tenant on the place; I got nothing from anybody else. All I got in three years was $10.00. When Mrs. Rathbone came to see me she would say that I had money that belonged to her, and that she wanted it. I never told her that the will under which I sold gave me no right to sell; I never informed her; I do not know whether or not I told her that I had sold the property. Mrs. Hamilton took possession of the property after I sold it to her. I do not know that I ever gave the plaintiff any money after she became of age. I think I have bought things for her after she became of age. She became of age in 1881. She said she was of age and she had a right to have these things or something of that kind. I do not know what it was I gave her; I cannot state what I gave her after she became of age. I kept the $1,500.00 at home after I received it. It seems to me that I had some of the money in the Freedmen's bank. I think that was in the panic of 1873. It was when the Freedmen's bank closed up. I had the money in bank a year. I had seven
38 or eight hundred dollars in bank. I do not know when the Freedmen's bank suspended. In 1872, when Mr. Elkin gave me a deed for this property, I do not remember whether I paid him anything for it or not. I suppose the $5.00 mentioned in the deed passed through our hands just as a matter of form so as to make the property over to his wife. I may have passed the $5.00 over to Mr. Elkin and had it passed back again, but I suppose that was the extent of the money that was furnished. I do not know how much money Mrs. Elkin gave her husband. She said that she got some from her father-in-law and some she worked for. I guess it was after she was married. She said that Mr. Elkin's father had sent her some money, and that he had sent her a sewing machine. She said that he sent her checks after the marriage. When these deeds were executed Mr. Elkin wanted to make the property over to his wife, and that was all there was of it. My matters as executor of Mrs. Elkin were in the hands of Col. Payne, and after he became auditor I placed them in the hands of J. Ambler Smith, and I proceeded according to their instructions. I never paid any of the purchase-money back to Mrs. Hamilton. When my father's real estate was sold in 1884 the 4 Elkin children were living with my sister. They had no means of support except the money paid me by Mrs. Hamilton. The amount received by them from the sale of my father's real estate was very small.

The defendant thereupon called as a witness MARY J. LOWRY, who, being duly sworn, testified as follows:

I am a sister of Mr. Calvert and of Mrs. Elkin. I live in New York city and have lived there since April, 1895. Before that time I lived in Washington, on and off, all my lifetime. I knew Mr. and Mrs. Elkin and the children. I knew something of the transfer of the property from Mr. Elkin to Mrs. Elkin. Her husband made it over to her, and part of the money he got was what his father sent to her from Philadelphia. She was in need of things and she asked for money to educate and take care of the children, and he sent her money at different times. I know she came down and told us that her husband took the money from her to pay some of the notes on his property. I have seen several checks Mrs. Elkin received. She kept the money in her stocking. Mr. Elkin was a clerk in one of the departments, and after he left that place he used to sell peanuts and bananas. Afterwards he opened a little grocery store on the corner of 7th and L streets N. W. He failed there. He then went to the Arlington hotel as a watchman. It was about that time that his wife was taken sick and died. I never saw him more than once after his wife's death. He came to the house in June of that year. He wanted to stop at our house, but I told him from the treatment his wife had got at his hands I could not accommodate him, and that he would have to go elsewhere. He said that he was going away; that he did not want to stay in the city. He did not say where he was going. I never saw him after that. At the time of Mrs. Elkin's death the plaintiff was 12 years and two months old. The others were aged six, eight, and ten. After their mother's death I took care of them until the plaintiff was married. She was married seven or eight years ago. Harry Elkin died at my house. He was a cripple. One of the girls died in Portsmouth, Va. I had no aid in raising the children except what my brother gave me. He would give me $10.00, $15.00, or $20.00 for board for them, just as I wanted the money. I think he gave me about $125.00 from the proceeds of the property he sold. The plaintiff knew the place was sold and she knew the money was coming from that sale. She talked about it and she told me so. My brother kept the children in shoes and clothes, and whenever they were sick he would get medicine for them and send for the doctor. The children were fed by me. They had no other means of support. Their father did not contribute to their support. I inquired about Mr. Elkin and wrote to his father in Philadelphia. The letter which I received in reply was an insulting one. I wrote to him and he sent back word that he had cast his son off; that he heard his son was married and that he and his wife had gone to England. "But the idea of his marrying and bringing those beggarly brats into the world for him to take care of, he could not and would not do it." That was four or five years after Mrs. Elkin died. There was no house on this place when Elkin got it from Quinter. The house was built afterwards. It was a two-story frame house, four rooms.

On cross-examination the witness testified as follows:

I saw Mr. Elkin last in June, 1876. He told me that he intended to leave the city. I never saw him after that. Four or five years later I wrote to his father. His father replied that he had heard something of him. I never heard a word since. After Mrs. Elkin's death I took the children and housed them and Mr. Elkin clothed them, and paid me in all about $125.00. I know Mrs. Elkin gave her husband something to pay the notes he gave for the
41 building of the house. I do not know whose money paid for the ground. I do not know how long after he bought the ground he started to build the house. The checks Mrs. Elkin received were to her order. I saw four of them; one was for ten dollars, one for fifteen dollars, one for twenty dollars, and one for twenty-five dollars. I do not know of any other money. Mrs. Elkin's husband got that money; she gave it to him while he was building the house. It was given to her for the children, but he took it away from her. It was not given to her for her own use. I do not remember the date when it was given to her. I do not know whether Mr. Elkin, Senior, sent this money to Mrs. Elkin before 1869 or not; I do not remember. Mrs. Elkin used to do sewing. The plaintiff remained at my house until she was married in 1888; she was of age in 1885. During those years she stayed with me, but she took in some sewing.

The defendant thereupon called as a witness WILLIAM HOLMEAD, who, being duly sworn, testified as follows:

I reside at Mt. Pleasant. I knew Abram Elkin and his wife. I remember when she died. After her death I saw Elkin; he was selling out the bedding, clothing, children's clothing, and everything in the house to a lot of colored people. He told me the Calverts had taken his wife and children, and that he was going away. He said he was going to leave the city. He said he was going to leave his children with the Calverts. His feelings towards the Calverts were very bitter.

On cross-examination the witness states as follows:

Elkin did not say where he was going. He bought the land in dispute from my half sister, Ada Quinter.

42 The defendant thereupon called as a witness MARY J. LOWRY, who, being duly sworn, testified as follows:

In the May before Mrs. Lucy Elkin died Abram Elkin's mother came to our house. Abram Elkin and his wife were very intimate, in close conversation all the time. There was some trouble between Mr. Elkin, Senior, and his wife. They did not live together. The son took sides with his mother. When I made inquiry of Abram Elkin's father he informed me that his son had gone to England. I wrote to him two or three years after Mrs. Elkin died. It was before 1891. In his letter to me Solomon Elkin did not state from whom he had heard about his son. He stated that he heard the son had gone to England with his wife and mother. I never saw

Abram Elkin's mother before or after the time I saw her when Mrs. Lucy V. Elkin died. I knew she came from Philadelphia.

On cross-examination the witness stated:

That was the only time I ever saw Mrs. Elkin, Senior. I never heard from her since. I don't know whether she is living or dead. When I saw her Abram Elkin's mother was a settled woman, of middle age, in good health.

Whereupon defendant called as a witness FANNIE M. CALVERT, who, being duly sworn, testified as follows:

I am the wife of Frederick G. Calvert. I knew Mrs. Abram Elkin. I know my husband spent money on her children. I can't fix the time. It was for several years. I did the buying. When the children needed anything they were sent to their uncle
43 or Mrs. Lowry would make the request of him, and I would go and get what they needed, get a receipt and bring it home. What I bought was clothing. I may have told the plaintiff when she wanted some things that she couldn't get that the money Mr. Calvert had in his hands for the children was all expended. I remember when the plaintiff was married.

On cross-examination the witness stated:

I think I told the plaintiff at one time about the money being all gone. I didn't say what money. I think she was not of age. It is my impression the money was all gone before she became of age. I don't know where Mr. Calvert kept his money.

The defendant further called FRANCES R. HAMILTON, who, being duly sworn, testified as follows:

After I purchased this land I erected a barn there that cost $700.00 and put a pump in the yard that cost $128.00, and put fencing all around it that cost $200.00. The house itself was nothing but a shell. I had it plastered and painted. I spent altogether in improvements on this property from 1879 down to the time suit was brought in 1891 about $8,000.00. It fronts on the 14th Street road about 80 feet and runs back about 100 feet. The barn is built close to the house. Anybody going along the road can see the house, barn, fencing, and other improvements. Since 1885 I have not put any improvements on the house, but have tried to keep the house up—have tried to keep it from falling down. The barn and fences were erected before 1885.

Q. I want you to state clearly and distinctly what your claim is to the possession of this property.

A. I bought it and paid for it, and I claim it under all titles, because I bought it and have paid for it and thought I was
44 buying it right and proper. I worked 35 years hard for the money I paid for that place. Up to the time the suit was brought there was no attempt to interfere with my possession and title.

On cross-examination the witness stated as follows:

I never got any other deed for the property than the deed from Calvert, the executor. I did not claim the property under any other deed than the deed he gave me, but I thought he had got a proper deed and was a man who could give me a proper deed. I bought the property from Mr. Calvert, had a lawyer examine the title, and paid Mr. Calvert the purchase price. I went into possession, and that is the way I claim to be the owner of the property. That is all. Since 1879 I have lived there, and it is my home. I did not rent any portion of it out. When I first went there I cultivated the place, but I keep a dairy there now. I saw Mrs. Rathbone out there in 1885; the first or second week in September. I won't be sure about the month, but it was in 1885. She came out and said to me, Mrs. Hamilton, you don't know me. She said, You don't know Abbie Elkin. I answered, You have grown out of my memory. She then said, Mrs. Hamilton, did you buy this place? I answered that I did. She said, Who did you buy it from? I said, I bought it from Mr. Calvert. She said, I don't see why my uncle Fred. had any right to sell papa's property. I said to her, If I understand it right, it is not your father's. She said, Well, mamma's then. I said, I don't know anything about it; I had a lawyer attend to it; you had better go to him, and he will tell you all about it. That was the substance of the talk. That was before she was married; it was in 1885. She said her name was Abbie Elkin. She did not say that she did not know the property had been sold. She said she was getting a big girl now, and it was time she was getting some benefit.

Q. Did she say she had gotten any benefit before that?

A. She did not say.

My daughter died November 22nd, 1885. This conversation was between that date and the end of the year. I never saw her out there before. I never saw or heard of her any more until she entered the suit.

The defendant thereupon called as a witness MARY JANE HAMILTON, who, being duly sworn, testified as follows:

I am a daughter of the defendant and lived with her at the time she bought this property. She improved the property before she went there. She put window blinds, window sashes, plastering, painting, and roofing on the house and built a barn, a fence, and a well. Anybody going along the road could see the improvements.

And thereupon counsel for the defendant announced their testimony closed.

Thereupon the plaintiff offered the following evidence in rebuttal, and by leave of court, first had and obtained, the plaintiff offered in evidence a patent from the State of Maryland conveying the ground in dispute to Anthony Holmead, and proved by record evidence the regular descent of the title from Anthony Holmead to Ada Quinter, formerly Ada Holmead, the grantor of Abram Elkin.

The plaintiff thereupon called as a witness GRACE A. B. RATHBONE, who testified as follows:

46 I was 12 years old when my mother died. After that I lived with my grandfather until he died, in 1880. Between 1876 and 1880 my aunt, Mrs. Lowry, fed and housed me. Between 1876 and 1880 I received nothing directly from Fred. Calvert, but he had his wife get me some articles of clothing, but nothing else. He gave me nothing more than he could possibly help. After 1880 I lived with Mrs. Lowry; she boarded me. I staid with her off and on until 1888, when I married. During those eight years I received only a few things from Mr. Calvert. I do not remember receiving anything from him after I became of age. After I became of age I supported myself by dressmaking. I first learned from my cousin that the place had been sold. I remember visiting Mrs. Hamilton, but don't think it was as late as December, 1885. It was earlier. I went there because my uncle told me there was no money; that was before I went to see Mrs. Hamilton. I first learned that Mr. Calvert had no authority to sell this property when Mr. Milans filed this suit. He was the one who first informed me. After I learned that the executor had no power to sell I never received anything from Mr. Calvert. I was married in November, 1888. I saw the letter that Mrs. Lowry received from my grandfather. I saw when she tore it up. There was something in it to the effect that he did not know anything about my father; that he had heard that my father had left and gone to England with his mother and something about his being married again. I was then about eighteen years old. I saw my father's mother in Washington at the time my mother was dead. I never saw her after she left the house that day. I never heard from her again. My mother's doctor bill and my brother's doctor's bill have never been paid. I never received
47 any money or cash from Mr. Calvert. He would purchase clothing for me once in a long time—maybe once a year. He never told me out of what money he was buying clothes for me. I never asked him what had become of the proceeds of this property.

On cross-examination the witness stated as follows:

When I went to see Mrs. Hamilton I went there to ask her about the property. Mr. Calvert said there was a mortgage on the property and I did not believe it, and I went to ask Mrs. Hamilton if there was a mortgage on it. She told me there was no mortgage on the property; that I could go to Mr. Carusi and find out. That wasn't all the conversation, but that was the main object of it. I don't remember whether I asked her if she had bought the property. I don't remember asking her what right Mr. Calvert had to sell my father's property or my mother's property. I testified at the first trial of this case. I then testified that I had heard that my mother made a will, but had never seen it until this suit was brought. I testified that Mr. Calvert informed me that some of the money had gone to pay off a mortgage. I testified at the first trial that he told me that he had lost several hundred dollars of the pro-

ceeds of sale which he had loaned to his brother. He said that some of the money had been loaned to his brother. I testified at the first trial that I received a pair of shoes from him, and I got an order from him for a pair of shoes, but I don't remember at what time I got them. I said I thought I was over 21 years of age when I got the shoes, but I don't know for certain that I was, for I don't know
48 the date. I have never been able to find out whether I was over 21 or not. I testified at the first trial that I was probably over 21 when I got the order for the pair of shoes. I don't know for certain. I may have been over 21. I first learned of this sale when I went up on Capitol Hill; that was before 1880. My grandmother came out to see my father just a little while before my mother died and I saw her. I saw her again when my mother was dead, a month later, but I only saw her twice.

The plaintiff thereupon called as a witness Mrs. ELLIS, who, being duly sworn, testified as follows:

I know something about the money which Mr. Solomon Elkin gave to his daughter-in-law. Twice I had money that she gave me to keep for her. She told me she received it from Solomon Elkin. It was $10.00 each time. She told me he sent her $25.00 once to buy a sewing machine with, which she bought. On the other occasion she used it for her own purposes.

Q. What did she do with the money—the two $10.00 bills?

A. I spent it for her in dry goods.

On cross-examination the witness testified:

Mrs. Elkin and I were raised together.

Thereupon the defendant, in surrebuttal, called as a witness A. A. LIPSCOMB, who testified in substance as follows:

Q. Mr. Lipscomb, were you present as counsel for the defendant at the first trial of this case?

A. Yes, sir; I was the counsel.

Q. I will ask you whether or not she testified at that time as follows:

"Thereupon counsel for defendant asked the witness if
49 she did not know that her mother had made a will, and that her mother's brother, Frederick G. Calvert, was the executor thereof, and that he had sold the property and disposed of it to the defendant; to which question she answered that she heard her mother had made a will, but had never seen it until after this suit was brought; that she also heard the property had been sold to the defendant and had called on her uncle, Frederick G. Calvert, to find out what had become of the proceeds of sale and was informed by him that most of it had gone to pay off a mortgage on the property, and that he had lost several hundred dollars of the proceeds of sale which he had loaned to his brother; that he gave that as an excuse for having no money for her; that on showing him how her shoes were worn out she obtained from him an order for a pair of shoes, and that she obtained from him at other times after her mother's death various small articles."

Q. Did she in substance testify as I have read?

A. In substance as you have read. The testimony was embodied in a bill of exceptions on the part of Mr. Colbert.

Q. This was prepared by her counsel?

A. By her counsel, and to that I assented as being the evidence, as we then recollected it, of this witness, and there it is printed.

Cross-examination:

Q. Do you recollect that you and I had several conferences in relation to the preparation of that bill of exceptions?

A. Yes, sir; we did.

Q. The testimony was not taken by a stenographer?

50 A. No, sir.

Q. It was the result of our joint recollection of what had taken place?

A. Unquestionably.

Q. You do not pretend to say those were the words of the witness?

A. I do not. I only say that what Mr. Worthington has read was what you and I agreed she had testified to.

Q. The substance of what she testified to?

A. Yes, sir; that was the substance of it.

Redirect examination.

By Mr. WORTHINGTON:

Q. Is it now your recollection that that is the substance of what she said?

A. I am positive about one item now, because Judge Bradley, who was then presiding in the case, asked the witness some questions himself. I am positive about the receipt of the pair of shoes after reaching her majority. I conducted the cross-examination of the witness, and am absolutely positive about that portion of her testimony.

By Mr. WORTHINGTON:

Q. And that she said she did not know whether she was of age or not when she received them, but that she probably was?

A. Yes; the other counsel was present, and I suppose his recollection will agree with mine about that.

And thereupon counsel for the plaintiff and defendant both announced their testimony closed.

And thereupon counsel for the plaintiff moved the court to instruct the jury on the whole evidence to return a verdict for

51 the plaintiff. To the granting of this instruction the defendant, by her counsel, objected, but the court overruled the objection and granted the instruction. To this ruling the defendant, by her counsel, then and there and before the jury retired, excepted, and prays the court to sign this her bill of exceptions,

29 which is done accordingly, now for then, this 5th day of February, A. D. 1896.

L. E. McCOMAS, [SEAL.]
*Associate Justice.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
*District of Columbia,* }

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 51, inclusive, to be true copies of originals in cause No. 31827, at law, wherein Grace Abbie B. Rathbone is plaintiff and Frances Rebecca Hamilton is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 21st day of February, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 554. Frances Rebecca Hamilton, appellant, *vs.* Grace Abbie B. Rathbone. Court of Appeals, District of Columbia. Filed Mar. 3, 1896. Robert Willett, clerk.

30 WEDNESDAY, *April 22d, A. D.* 1896.

FRANCES REBECCA HAMILTON, Appellant, } No. 554.
*vs.*
GRACE ABBIE B. RATHBONE. }

The argument in the above-entitled cause was commenced by Mr. A. A. Lipscomb, attorney for the appellant.

THURSDAY, *April 23d, A. D.* 1896.

FRANCES REBECCA HAMILTON, Appellant, } No. 554.
*vs.*
GRACE ABBIE B. RATHBONE. }

The argument in the above-entitled cause was continued by Mr. A. A. Lipscomb, attorney for the appellant, and by Messrs. M. J. Colbert and George E. Hamilton, attorneys for the appellee, and was concluded by Mr. A. S. Worthington, attorney for the appellant.

31 FRANCES REBECCA HAMILTON, Appellant, } No. 554.
*vs.*
GRACE ABBIE B. RATHBONE. }

*Opinion of Court.*

Mr. Chief Justice ALVEY delivered the opinion of the court: This case has been in this court on a former appeal, and the de-

cision then made is reported in 4 App. D. C. 475. The facts of the case are there set out, and it is only necessary to refer to them here so far as it may be required to an understanding of the questions presented on this appeal.

At the conclusion of the trial below, and upon the whole evidence produced, the court, at the request of the plaintiff, instructed the jury that the verdict should be for the plaintiff, and such verdict was accordingly rendered and the defendant excepted, and has prosecuted this appeal.

In respect to the instruction given, there are three errors assigned. 1st. That the court should have left the question to the jury to determine, whether the conveyance of the land from Elkins, the husband, to Calvert, and by the latter to Mrs. Elkins, the wife, under whom the plaintiff claims, was founded upon a valuable consideration, and therefore invested the wife with a statutory separate estate, with power to will the same. 2d. That there was error in holding that there was no matter of fact for the consideration of the jury upon the question of the life or death of Abram Elkins, the tenant by the curtesy; and, 3d. That there was error in holding by the court that there was no sufficient evidence to support an estoppel as against the plaintiff's right to recover, upon the ground of the alleged receipt of some portion of the proceeds of the sale of the land in controversy by the plaintiff, and her failure to disaffirm the sale made by the executor under the power in her mother's will, within a reasonable time after attaining the age of majority.

1. With respect to the first of these questions, but little need be said. It has already been held by this court, on the former appeal, that the conveyance of the land to the wife by the husband, through a third party as a mere intermediary, was a gift or conveyance from the husband to the wife, within the meaning of the statute; and there is nothing shown in the present record to change in any manner the former declared effect of the conveyances. It is not pretended that there was any consideration passed from Calvert to Elkins, or from Mrs. Elkins to Calvert, for the conveyances. The facts of the transaction are stated by Calvert, a party to the deeds, and who was called and examined as a witness in the case by the defendant. The small amounts of money referred to in the evidence, that were received by Elkins, the husband, from his wife, were given him to aid in paying for the building of the small house that was erected on the land.

2. The question whether Elkins, the tenant by the curtesy, was dead or alive, at the time of the bringing of the present action of ejectment, in the absence of any direct or positive evidence of the fact, the one way or the other, is determined by presumption raised by law. The principle uniformly maintained is, that where a party has been absent seven years without having been heard of, the presumption is that he is then dead, though there is no presumption as to the time when he died. Davie *v.* Briggs, 97 U. S. 628. The principle, with its limitations and qualifications, is found clearly stated in the works of both Greenleaf and Taylor on Evidence. In the first of these works, that of Greenleaf, sec. 41, the principle is

stated to be, that "where the issue is upon the *life* or *death* of a person once shown to have been living the burden of proof lies upon the party who asserts the death. But after the lapse of *seven years*, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party. This period was inserted, upon great deliberation, in the statute of bigamy, and the statute concerning leases for lives, and has since been adopted, from analogy, in other cases." The principle is stated in substantially the same terms in 1 Taylor on Evidence, sec. 200 (8th edition), and also in Stephen on Evidence, ch. 14, art. 99. The evidence shows, as well that produced on the part of the defendant, as that produced on the part of the plaintiff, and about which there is no dispute, that soon after the death of his wife, in 1876, Abram Elkins, the surviving husband, left his domicile in this District and went to parts unknown to his children, or to their relations in whose care they were left; and he left them in a state of utter destitu-
32 tion and dependence. The proof shows that repeated inquiries have been made to ascertain his whereabouts, or whether he was dead or alive, and that no tidings of him could be or has been obtained. To the time of bringing this action, his absence had continued for about fifteen years, and to the present time, for a period of about twenty years; and no person here appears to know whether he be dead or alive. Both duty to and the natural affections of a parent for his helpless children certainly constituted the strongest possible incentive to his return, or at least to some correspondence with his children, or with those having the care of them. But no certain or reliable intelligence whatever has been received of him. In view of these facts, it is but a charitable construction of them, as well as an established legal presumption arising thereon, that the party was dead after the lapse of seven years from the time of his leaving this District; and the court below was quite right in acting upon that presumption. Upon the facts in evidence, the burden was cast upon the defendant of producing evidence to rebut the presumption of death; but no such evidence was offered.

3. Then, with respect to the third question, that of an estoppel, the evidence furnishes no foundation for its support.

The evidence shows, and about which there is no dispute, that the plaintiff was born in March, 1864, and was one of four children left by her mother, who died in 1876. The property in controversy was sold to the defendant by the executor of Mrs. Elkins for $1,500, and at that time the plaintiff was about fifteen years of age. Of the proceeds of sale of the property some portion was applied by the executor to the support and maintenance of the plaintiff before she arrived to the age of majority. It was attempted to be shown that the plaintiff had been furnished by Calvert, the executor, with a pair of shoes after she arrived at age; but whether she was of age at the time is left in great doubt and uncertainty. Calvert himself, a witness produced on the part of the defendant, says: "I do not know that I ever gave the plaintiff any money after she became of age. I think I have bought things for her after she became of age. She

became of age in 1881. She said she was of age and she had a right to have these things, or something of that kind. I do not know what it was I gave her; I cannot state what I gave her after she became of age." The witness states that the plaintiff became of age in 1881, but if he intended to say that she attained the age of twenty-one years in 1881, he must have been mistaken, as the other witnesses, including the plaintiff herself, who testified as to the age of the plaintiff, say that her mother and father were married in 1863, and that she was born in 1864, and, consequently, she did not attain the age of twenty-one years until 1885. She says that the last article furnished her by Calvert, the executor, was a pair of shoes, but she cannot be positive whether she was then of the age of twenty-one years or not. The suit was brought in June, 1891, the plaintiff then being about twenty-seven years of age.

It is a settled principle that estoppels *in pais* are not applicable to infants, and even a fraudulent representation as to capacity, made by an infant will not be taken as an equivalent for actual capacity. Sims *v.* Everhardt, 102 U. S. 300. And where a deed in relation to real estate is made by an infant, the preponderance of authority, would appear to hold, that mere silence or inactivity, after becoming of age, continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the deed, will not bar the infant's right to avoid the deed. Sims *v.* Everhardt, *supra*. But in this case, the question is, not whether there has been any affirmance or disaffirmance of a *voidable* deed or conveyance of an infant, after such infant had attained full age, but whether there has been such an adoption or ratification by equitable construction of an entirely *void sale and conveyance* of an infant's estate, made by a third party, as executor or trustee, as will operate by way of an estoppel as against the owner—an infant at the time of the sale and conveyance made—by reason of the fact that such infant owner has received from the executor or trustee some portion of the proceeds of sale? The equitable estoppel set up, to be effective as a bar to the right of recovery in an action of ejectment, must be coextensive with the original interest and title of the plaintiff. In other words, the ground of estoppel must apply to and constitute a full and complete answer to the plaintiff's right to recover the possession of the entire interest in the land sued for. How a court of equity might consider and deal with the facts of the case, is a question that we are not called upon to determine in this action. The attempt here is, to set up and make available, as a defense to an action of ejectment, what is supposed to be an equitable estoppel, founded solely upon the fact that the plaintiff, while an infant, had applied for her support and maintenance, some portion of the purchase-money received for the property sold by the executor. It is not pretended that the plaintiff, by any act, conduct or admission of hers, caused or induced any change in the position of the defendant, to her prejudice. At the time of the sale to and the payment of the purchase-money by the defendant, the plaintiff was only about fifteen years of age, and had no participation whatever in the making of the sale. That

was a transaction between Calvert, acting under a supposed power which proved to be utterly void, and the defendant, the purchaser of the property under such power.

There are many cases found in the books where attempts have been made to preclude parties from asserting their rights to property, which had been illegally disposed of while they were under age or other disability, by force of what is denominated an equitable estoppel. But it is only in very peculiar cases and under very strong circumstances, and where the proof is clear and unmistakable, that such defenses can be maintained, and especially as a defense to an action at law to enforce a clear legal right. Otherwise, the infancy or other disability of the party whose property has been illegally disposed of, would afford him no such adequate protection as is contemplated by the law.

It has, however, been laid down in many cases, as being within the principle of equitable estoppel, that where a party, after
33 he attains full age, and is under no disability, and acts with full knowledge of all the facts, accepts the proceeds of an unauthorized sale of his property made while he was a minor, is estopped to dispute the validity of the sale. Goodman *v.* Winter, 64 Ala. 410; France *v.* Hayner, 67 Iowa, 139; Schenck *v.* Saulter, 73 Mo. 46; Moore *v.* Hill, 85 N. C. 218. And so it has been held, that the reception and substantial enjoyment of the benefits of the transaction, *after reaching majority*, such as collecting the dividends or interest, or receiving the principal, or other act totally inconsistent with an honest intention to disaffirm or reject the contract, will operate as an estoppel. Schouler, Dom. Rel., sec. 435, page 657. But a party who receives money while under age, from the sale of lands, is not estopped to claim the land on attaining his majority. Gillespie *v.* Nabors, 59 Ala. 441. And where land was sold for the purpose of raising funds to educate an infant, with the consent of the infant and her mother, and the money was used for such purpose, it was held, that the infant, after coming of age, was not estopped to claim the land. Schnell *v.* Chicago, 38 Ill. 383. And it has been repeatedly held, that infants whose property has been sold without legal authority by parents, guardians, or any one else, can recover the property and thus avoid an illegal sale of land, without first tendering the price to the purchaser, leaving him, however, to recover back such consideration as may remain within his reach. Schouler, Dom. Rel., secs. 444, 446; Pitcher *v.* Laycock, 7 Ind. 398; Cressinger *v.* Welch, 15 Ohio, 156; Green *v.* Green, 69 N. Y. 553; Besinger *v.* Wharton, 27 Gratt. 857.

In the case of Russ *v.* Alpaugh, 118 Mass. 369, a tenant by the curtesy, being in possession of the premises, executed a mortgage, with full covenants of warranty, which was duly acknowledged and recorded, and which was foreclosed, and under which the defendant claimed title; and the tenant by the curtesy having died, leaving assets of equal value at the time with the demanded premises, and which assets descended or were distributed to the heirs claiming title under the mother, it was held (Mr. Ch. J. Gray delivering the opinion of the court), that the children were not estopped by

the deed or mortgage of the father, and the receipt of the assets of his estate, to assert their title to the land by inheritance from the mother.

The portion of the proceeds of sale of the property that was expended for the board and clothing of the plaintiff by her uncle, the executor, was expended during her minority, and the proof does not show, with any degree of certainty, what portion of the proceeds of sale was thus expended. The only article about which there could be any doubt as to the time when it was supplied is a pair of shoes, and in regard to that the proof wholly fails to fix the time with any certainty. That article, however, even supposing it to have been supplied by the uncle after the plaintiff arrived at age, was too insignificant to be made the foundation of an equitable estoppel to preclude the plaintiff the right to recover her interest in the land sued for. There is no sufficient basis shown for the application of the principle of equitable estoppel.

The cases relied on by the defendant, of Dickerson *v.* Colgrove, 100 U. S. 578, and Kirk *v.* Hamilton, 102 U. S. 68, do not apply to this case. They were cases of the application of the doctrine of equitable estoppel, it is true, but those cases did not relate to the property of infants, nor did they involve in any manner the consideration of the doctrine of adoption or ratification of illegal sales of infants' real estate, after the infant owner had attained full age.

This is doubtless a hard case upon the defendant. But the deeds and will relating to the title were all matters of public record, and it was incumbent upon the defendant, as it is upon all other purchasers, to make due inquiry as to the title of the property purchased, before parting with the purchase-money. Kirby *v.* Tallmadge, 160 U. S. 379.

We find no error in the instruction given by the court below, and the judgment must therefore be affirmed.

*Judgment affirmed.*

34 MONDAY, *June 1st, A. D.* 1896.

FRANCES REBECCA HAMILTON, Appellant, *vs.* GRACE ABBIE B. RATHBONE. } No. 554. April Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

June 1, 1896.

35 In the Court of Appeals of the District of Columbia.

FRANCES REBECCA HAMILTON, Appellant,
*vs.*
GRACE ABBIE B. RATHBONE, Appellee.
} April Term, 1896. No. 554.

And now comes the appellant, by her attorneys, Messrs. Worthington, Lipscomb, and Walker, and moves the court for a writ of error removing the said cause to the Supreme Court of the United States, and in support thereof files an affidavit as to the value of the property in controversy.

A. S. WORTHINGTON,
A. A. LIPSCOMB,
PHILIP WALKER,
*Attorneys for the Appellant.*

Endorsed: April term, 1896. No. 554. Frances R. Hamilton *vs.* Grace A. B. Rathbone. Motion for writ of error to Supreme Ct. U. S. Court of Appeals, District of Columbia. Filed Jun- 11, 1896. Robert Willett, clerk. Worthington, Lipscomb & Walker, att'ys for appellant.

36 In the Court of Appeals of the District of Columbia.

FRANCES REBECCA HAMILTON, Appellant,
*vs.*
GRACE ABBIE B. RATHBONE, Appellee.
} April Term, 1896. No. 554.

DISTRICT OF COLUMBIA, *ss:*

I, William Holmead, having been first duly sworn, on oath say that I am a resident of the District of Columbia, residing in the immediate vicinity of the land at issue in this cause; that I am fully acquainted with the value of property in that portion of the District of Columbia; that in my opinion the land at issue herein is worth at the present time forty cents per square foot throughout and one dollar per square foot for that portion within one hundred and fifty feet of the street (14th).

WILLIAM HOLMEAD.

Subscribed and sworn to before me this 9th day of June, A. D. 1896.

RUTLEDGE WILLSON,
[NOTARIAL SEAL.] *Notary Public.*

Endorsed: 554. In the Court of Appeals of the District of Columbia, April term, 1896. # 554. Frances Rebecca Hamilton, appellant, *vs.* Grace Abbie B. Rathbone, appellee. Affidavit of Wm. Holmead as to value of property. Court of Appeals, District of Columbia. Filed Jun- 11, 1896. Robert Willett, clerk. Worthington, Lipscomb & Walker, attorneys for appellant.

37 THURSDAY, *June 11th, A. D.* 1896.

FRANCES REBECCA HAMILTON, Appellant,
*vs.*
GRACE ABBIE B. RATHBONE. } No. 554.

On motion of Mr. Philip Walker, of counsel for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three thousand dollars.

38 Know all men by these presents that we, Frances Rebecca Hamilton, as principal, and William Holmead, as surety, are held and firmly bound unto Grace Abbie B. Rathbone in the full and just sum of three thousand dollars, to be paid to the said Grace Abbie B. Rathbone, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between said Frances Rebecca Hamilton, appellant, and said Grace Abbie B. Rathbone, appellee, a judgment was rendered against the said Frances Rebecca Hamilton, and the said Frances Rebecca Hamilton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Grace Abbie B. Rathbone, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Frances Rebecca Hamilton shall prosecute said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

her
FRANCES REBECCA x HAMILTON. [SEAL.]
mark.
WILLIAM HOLMEAD. [SEAL.]

Sealed and delivered in the presence of—
A. A. LIPSCOMB,
PHILIP WALKER,
As to mark of Frances R. Hamilton.

R. W. DUTTON,
F. L. WILLIAMS,
As to Wm. Holmead.

Approved by—
R. H. ALVEY, *Ch. Justice.*

The surety, Wm. Holmead, is satisfactory.
G. E. HAMILTON.

[Endorsed:] No. 554. Frances Rebecca Hamilton *vs.* Grace Abbie B. Rathbone. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 27, 1896. Robert Willett, clerk.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Frances Rebecca Hamilton, appellant, and Grace Abbie B. Rathbone, appellee, a manifest error hath happened, to the great damage of the said appellant, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,
*Clerk of the Court of Appeals of the District of Columbia.*

40 UNITED STATES OF AMERICA, *ss:*

To Grace Abbie B. Rathbone, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Frances Rebecca Hamilton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service acknowledged June 27th, 1896.

H. G. MILANS,
HAMILTON & COLBERT,
*For Appellees.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-27, 1896. Robert Willett, clerk.

41 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 40, inclusive, contain a true copy of the transcript of the record and proceedings of said Court of Appeals in the case of Frances Rebecca Hamilton, appellant, *vs.* Grace Abbie B. Rathbone, No. 554, April term, 1896, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 2d day of July, A. D. 1896.

ROBERT WILLETT,
*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: Case No. 16,345. District of Columbia Court of Appeals. Term No., 206. Frances Rebecca Hamilton, plaintiff in error, *vs.* Grace Abbie B. Rathbone. Filed July 27th, 1896.

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1897.**

*No. 206.*

FRANCES REBECCA HAMILTON, PLAINTIFF IN ERROR,

*vs.*

GRACE ABBIE B. RATHBONE.

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

On June 13, 1891, the defendant in error brought an action of ejectment in the supreme court of the District of Columbia against the plaintiff in error to recover an undivided third interest of a parcel of land in the District of Columbia, of which the plaintiff in error was then in possession. A plea of not guilty having been interposed, and issue being joined, the case was tried before Mr. Justice Bradley and a jury in January, 1893. When the evidence was closed the presiding justice directed the jury to render a verdict for the defendant. But on appeal to the Court of Appeals from the judgment entered upon the verdict so rendered, the

Court of Appeals set aside the verdict and remanded the case for a new trial. The second trial was had before Mr. Justice McComas and a jury, and at the close of the evidence he instructed the jury to render a verdict for the plaintiff. From the second judgment the defendant appealed to the Court of Appeals, and that court affirmed the judgment appealed from; whereupon the defendant brought the case here by writ of error.

By a deed dated July 31, 1867, one Thomas J. Quinter and his wife conveyed the land in question to Abram Elkin, who was the husband of Lucy V. Elkin (Record, p. 17). On the 29th of April, 1872, Abram Elkin and his wife conveyed this tract to her brother, Frederick G. Calvert (13, 14), and on the same day Calvert and his wife conveyed it to Lucy V. Elkin (12). The title remained in Mrs. Elkin until her death, which occurred on May 3, 1876 (15). She left a will by which she appointed Calvert her sole executor. She directed that all her property, real and personal, should be sold, and gave her husband, Abram Elkin, $1,000 out of the proceeds of the sale, directing that the residue of the proceeds of sale, after the payment of funeral and other necessary expenses, should be divided equally between her four children (17). Calvert duly qualified as executor (11). In February, 1879, he sold the land in controversy to the plaintiff in error, and on the 20th of that month he, as executor, made and delivered to the purchaser a deed, which recited the will and the sale under the powers thereby conferred, and by which he conveyed the land to the plaintiff in error (8, 9). Of the four children of Mrs. Elkin who survived her, one died in 1885, when under ten years of age. The other three were living at the time this action was begun (15) and the eldest of the three is the plaintiff.

To sustain her action the plaintiff claimed that Mrs. Elkin held this real estate as her general property, not as her separate estate, and that, being a married woman, she could not devise it. It was because these questions were decided against

her by the presiding justice at the first trial that a verdict was then directed for the defendant. On the appeal that followed, the Court of Appeals sustained the plaintiff's contention. The opinion of the court was delivered by Mr. Chief Justice Alvey, and a copy of it is appended to this brief. It will be found also in the report of the case in 4 App. Cas. D. C., 475. The case was made to turn upon the construction of section 728 of the Revised Statutes of the District of Columbia. The original statute from which that section is derived was an act of Congress, approved April 10, 1869, entitled "An act regulating the rights of property of married women in the District of Columbia" (16 Stat., 45), of which the following is a copy:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *femme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise, and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried.

SEC. 2. *And be it further enacted*, That any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

In the revision of the District laws in 1874 this act became sections 727 to 730, as follows:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be sub-

ject to the disposal of her husband, nor be liable for his debts.

"SEC. 728. Any married woman may convey, devise and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"SEC. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

It will be seen that while the original act gives a married woman the right to devise property acquired during marriage in any way other than by gift or conveyance from her husband, section 728 of the Revised Statutes gives her the right to devise "her property" generally.

At the second trial the defendant submitted to the jury evidence which it was claimed tended to show that the conveyance of the property in dispute to her was for a valuable consideration. If she could have established this fact it would have entitled her to a verdict in her favor, as this court has held that the exception in the married women's act in the District as to "gift or conveyance from her husband" does not apply where there is a valuable consideration for the deed from the husband to the wife. (Sykes *vs.* Chadwick, 18 Wall., 141, 148.)

The Court of Appeals in remanding the case for a second trial intimated that there was a difficulty in the plaintiff's case growing out of the fact that upon the death of Mrs. Elkin her husband became entitled to possession as tenant by the curtesy, and that "to maintain the action the death of the father must be shown, either by positive proof or presumption." Accordingly, at the second trial there was evidence

which the plaintiff claimed entitled her to the benefit of the presumption of death after absence for seven years.

When the defendant purchased from Calvert the land in dispute the plaintiff was a little less than fifteen years old (8, 15). When she began this suit in June, 1891, she was over twenty-seven years of age. It was claimed on behalf of the defendant that the evidence at the trial justified the defendant in asking the court to leave to the jury the question whether the plaintiff, by her acts of omission and commission after she reached the age of twenty-one, had not precluded herself from assailing the defendant's title under the purchase from Calvert.

When the evidence was closed, however, the court instructed the jury to render a verdict for the plaintiff. To this ruling the defendant duly excepted, and her bill of exceptions was duly signed and filed (28, 29). On the second appeal the Court of Appeals affirmed the judgment below. The opinion of the court is in the record (29–34).

When the defendant purchased the property in 1879 she paid $1,500 for it (8). After that time, and before this suit was brought, she spent about $8,000 in improvements on the land (24).

As usual in ejectment cases, the record in the trial court did not fully disclose the value of the land in controversy. In each of the several deeds the tract is described, and is shown to contain one acre of land, and to front about one hundred feet ($6\frac{1}{10}$ perches) on "Fourteenth Street road." When application was made to the Court of Appeals to allow the writ of error from this court, there was filed in support of the application the affidavit of William Holmead, who stated that he resides in the vicinity of the land; that he knows its value; that that part fronting on Fourteenth street to a depth of one hundred and fifty feet was worth one dollar per square foot, and that the remainder was worth forty cents per square foot (35). This would make the value of the land (without reference to the improvements) over

twenty-six thousand dollars. The plaintiff claimed to recover a one-third interest in this tract. Another suit in ejectment was brought by the plaintiff and her only surviving brother to recover the other two-thirds interest in this land, and by stipulation that suit abides the result of this.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In holding that the will of Lucy V. Elkin was void as to the real-estate in controversy.

2. In holding that the evidence was insufficient to entitle the defendant to go to the jury on the question whether the conveyance of the land in controversy by Abram Elkin to the defendant, through Calvert, in April, 1872, was made for a valuable consideration.

3. In holding that there was not sufficient evidence in the case to entitle the defendant to go to the jury upon the question whether the plaintiff was not precluded from assailing the conveyance from Calvert under which the defendant claimed title.

4. In holding that upon the evidence the jury were bound to find as a fact that Abram Elkin was dead on the 13th of June, 1891, when this action was brought.

5. In not sustaining the defendant's exception to the instruction granted at the trial directing the jury to find a verdict for the plaintiff.

6. In affirming the judgment of the supreme court of the District of Columbia in favor of the plaintiff.

## ARGUMENT.

### I.

THE WILL OF MRS. ELKIN WAS VALID AS TO THE REAL ESTATE IN CONTROVERSY.

1. *The testatrix held this land, not as a part of her general property, but as her equitable separate estate, and therefore could devise it without reference to the married women's act of* 1869 *or any other statute.*

The long-established rule of courts of equity, that where a married woman holds real property as her separate estate she may devise or otherwise dispose of it as if she were a *femme sole*, has always been in force in the District of Columbia (Sexton *vs.* Wheaton, 8 Wheat., 229; Prout *vs.* Roby, 15 Wall., 471). It was formerly held in England that the intervention of a trustee holding the legal title was necessary to support such a separate estate in a married woman. But the law has been otherwise for a hundred years, and the modern doctrine that where the legal title to real estate is transferred to a married woman for her separate use the husband, in whom the legal title vests by law, will be decreed to hold it in trust for his wife, is the settled law of this country. (Jones *vs.* Clifton, 101 U. S., 225.)

The habendum clause of the deed from Calvert to Mrs. Elkin is as follows:

"To have and to hold the said piece or parcel of land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, *to and for her and their sole use, benefit and behoof forever.*"

The English and American cases upon the question of what words will import a separate estate in a deed or other

instrument vesting a legal or equitable title to real estate in a married woman are collected in Schouler on Husband and Wife, sec. 225; Schouler on Domestic Relations, sec. 105, n. 4, and in 3d Pom. Eq. Jur., sec. 1102, n. 1. Schouler observes, in his work on Domestic Relations, that the words "sole use" seem to be enough for this purpose. Pomeroy states that the American courts on this subject are more liberal in favor of the wife than the English courts.

As to the English cases, it was held by Sir William Grant, master of the rolls, in Adamson *vs.* Armitage, 19 Ves. Jr., 416, that the bequest of the income of a certain fund to a married woman "to be for her sole use and benefit" gave her a separate estate. On this subject he said:

"There was some dispute at the bar whether this was for her sole and separate use, as there would then have been a reason for this direction, though the property was in her. I think the direction, that it shall be for her sole use, sufficient to vest the property in her exclusive of the marital right. In a case mentioned in *Lumb vs. Milnes*, Lord Alvanley had held that a bequest to a woman for her own use and benefit was sufficient, showing that it was not for her husband's use, and if for her sole use it is just as strong to show that it cannot be for her husband's.

"Upon the whole, I think the plaintiff entitled to the absolute interest in this fund."

In a bequest to trustees, the phrase "in trust for her sole benefit during her lifetime" was held to vest in the beneficiary—a married woman—a separate estate. (Green *vs.* Britten, 1 De G., J. & S., 649.)

In Gilbert *vs.* Lewis, 1 De G., J. & S., 38, a testator had devised and bequeathed all his real and personal estate to the plaintiff—a married woman—"for her sole use and benefit." The suit involved real estate, and the Lord Chancellor (Lord Westbury) held that this language gave the wife no separate estate, but he decided the case on another ground.

In Lindsell *vs.* Thacker, 12 Sim., 178–184, the question was whether a general devise by a husband to his wife passed his interest in certain real estate to which he held the legal title in trust for other persons, and that was made to depend upon whether the wife took a separate estate. The language of the devise in that case was:

"I hereby give and bequeath all my property whatsoever * * * unto my loving wife for her sole use forever."

It was held that this language gave the wife a separate estate, and that therefore the interest in real estate which the husband held simply in trust did not pass. Vice-Chancellor Shadwell, in deciding the case, said:

"The words 'sole use' necessarily imply separate use, and indicate that the testator meant that the property which he had devised to his wife should be enjoyed by her beneficially."

In Inglefield *vs.* Coglan, 2 Coll. & C. C., 247, it was held that a bequest to a married woman "solely and entirely for her own use and benefit during her life" gave her a separate estate during her life.

In Bland *vs.* Dawes, L. R., 17 Ch. D., 794–797, Vice-Chancellor Malins was required to construe, in a legacy to a married woman, the words "for her sole use and disposal." He said:

"I have a strong impression that wherever property is given to the 'sole use' of a woman, the intention is to give it to the separate use, because the word 'sole' must mean one person. * * * However, the authorities are adverse to that view."

He then holds (following Pritchard *vs.* Ames, T. & R., 222) that the addition of the words "and disposal" sufficiently indicated that a separate estate was intended.

In Lewis *vs.* Matthews, L. R., 2 Eq., 177, the question at issue and the manner in which it was decided sufficiently

appear from the following quotation from the opinion of Vice-Chancellor Kindersley:

"What, then, is the effect of the devise being to Hannah Walker, her heirs, executors, administrators, and assigns forever, 'for her and their own sole and absolute use forever'? Does the word '*sole*' import that the devise is to her '*separate*' use?

"There seems to have been different opinions on the point. In Lindsell *vs.* Thacker the Vice-Chancellor of England held that a devise to testator's wife for her sole use forever necessarily implied separate use. In Gilbert *vs.* Lewis, Lord Westbury held that a devise to a testator's wife for her sole use and benefit did not give her an estate to her separate use. In Green *vs.* Britten the lords justices were of opinion that a bequest of personalty to a married woman, with a direction that it should be invested as the executors should think proper in trust, for her sole benefit, during her lifetime, was a gift to her separate use. The point, however, appears not to have been contested.

"But in the present case the word 'sole' is not confined to the lady herself, but is applied equally to her heirs, executors, administrators, and assigns, to whom it could not have been intended to give a separate estate, and that appears to me conclusively to show that the testator did not mean by the use of that word to give to Hannah Walker the property for her separate use, but only to give her the absolute interest, and that it is used very much in the same sense as the word 'absolute.'"

But in a case entitled "*In re* Tarsey's Trust," L. R., 1 Eq. Cas., 561, Vice-Chancellor Page held that a separate estate was created by the words "for her own sole use and benefit absolutely," and this notwithstanding in a preceding clause of the instrument relating to another gift the words "sole and separate use, free from the control of any husband," were used. The Vice-Chancellor refers to Lord Westbury's opinion in Gilbert *vs.* Lewis, as "extrajudicial."

In two English cases which are found cited as against the proposition that the words "to her sole use" will create a separate use, it will be found that the opinion of the court

was based entirely upon the fact that in other clauses of the same will relating to other bequests or devises the scrivener had used the words "to her sole and separate use." (Kensington *vs.* Dolland, 2 Mylne & Keen, 184; Roberts *vs.* Spicer, 5 Madd. Ch., 298.)

Finally came the case of Massy *vs.* Rowen, L. R., 4 Eng. & Ir. App., 288–297, in which the House of Lords was called upon to construe a will in which the testator had devised real estate to certain persons in trust "*for the sole use*" of his daughter and her assigns. It appeared that at the time of the making of the will the daughter was single, and that at that time the testator had another daughter, who was married, for whom he likewise made provision, and in reference to her used the words "sole and separate use." The principal opinion in the case was delivered by Lord Chancellor Hatherly. He advised, the other judges concurring:

1. That the word *sole* is not like *separate*, a technical word necessarily implying in such a connection exclusion of the husband.

2. That if there be nothing else in the instrument to show an intention to give a separate estate, the husband is not excluded.

3. That in the particular case other parts of the will, and especially the provision for the married daughter, showed that in the provision for the unmarried daughter the word *sole* meant the exclusion of the other beneficiaries, not a future husband.

The Lord Chancellor expressly declined to give any weight to the fact that the word "sole" was made to apply to the daughter's *assigns* as well as to herself. He evidently intended to criticise, without mentioning it, the conclusion reached by Vice-Chancellor Kindersley in construing a

similar expression in Lewis *vs.* Matthews, L. R., 2 Eq., 177, *supra*.

The following are believed to be the principal American cases on the question now under consideration.

In Jamison *vs.* Brady, 6 S. & R., 466, the supreme court of Pennsylvania held that a bequest to a married woman "for her own use" created a separate estate.

In Williams *vs.* Holmes, 4 Rich. Eq., 475–479, it was held that the words "in trust for the sole use, benefit, and behoof" were technically expressive of an intention to create a separate estate.

In a deed of chattels to a trustee "for the proper use and benefit" of a married woman it was held in Mississippi that this imported a separate estate in the wife during the joint lives of the husband and wife, but that on her death he became entitled to the property. (Warren *vs.* Haley, 1 Sm. & M., 647.)

In a similar instrument it was held in Tennessee that the words "for the use and benefit of said Elizabeth and children, and to remain in the possession of said Elizabeth for the use and support of said children forever," gave a separate estate. (Hamilton *vs.* Bishop, 8 Yerg., 33.)

The testator devised all his real and personal property to his wife "for her own proper use during her lifetime"—remainder over. In a case which involved the title to personal property only, but in which the court made no distinction between the effect of the will upon real and personal property, it was held that the words "to her own use" would have been enough to create a separate estate, and that the word "proper" gave this meaning emphasis. Said the court: "'To her own use' is equivalent to her own peculiar use, as essentially belonging to her or to her own use strictly." (Snyder *vs.* Snyder, 10 Pa. St., 423.)

A devise of real estate to children and their heirs forever, "to be for their sole use and benefit," was held to give to one of the children, a daughter, a separate estate. In that

case, however, some stress was laid upon the fact that another clause of the will directed the trustees, in whom the legal title to the property was vested, to take receipts from the children. (Jarvis *vs.* Prentiss, 19 Conn., 272–282.)

In the case of Prout *vs.* Roby, 15 Wall., 471, a case which originated in the supreme court of the District of Columbia, this court held that where a lease was made for ninety-nine years to a trustee for the benefit of a married woman, her heirs or assigns, she took a separate estate in the lease. The instrument contained an express power to her to dispose of her interest by will. Mr. Justice Swain, delivering the opinion of the court, said:

"No particular phraseology is necessary to create the provision for *a femme covert*, technically designated in the law as her *separate estate*. As in all other cases of instruments to be construed, the controlling test is the intent of the parties. That, in whatever language it may be clothed, constitutes the contract. Here the meaning is so clear that no room is left for doubt. The intervention of the trustee and the power of disposition by will could have had no purpose but to give to the *cestui que trust* the same power over the lease as if she had been *a femme sole*, and to place it beyond the reach and control of her husband, both during her life and after her death. These facts are irreconcilable with any other view of the subject. No interest in the lease could vest in the husband without some act on her part in his favor. No such act was done. His assumption of control over the premises after her death was simply usurpation, and no right or title passed under his will to his devisee."

It was held in Merrill *vs.* Bullock, 105 Mass., 493, apparently without discussion or controversy, that a grant of real estate to a married woman in her own right, *habendum*, "To the said * * * her heirs and assigns, to her and their use and behoof forever," did not create a separate estate. It will be observed that the word *sole* was omitted in this deed.

In Griffith's Adm'r *vs.* Griffith, 5 B. Monroe, 113–115, it

was held as to a deed of *personal* property to a married woman that the words "for her own proper use and benefit forever" strongly indicate an intention to create a separate estate; but it is said in the opinion in that case, *obiter*, that in a deed of land, such words being usual and importing only an absolute transfer of the title, would not operate to give a separate estate and exclude the husband. The court say that in the case of personal property if there be no separate use the husband takes the full title and the deed would really be a deed to him.

And this court in the case of Lippincott *vs.* Mitchell, 94 U. S., 767, held that in a conveyance of lands in Alabama to a married woman the words "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns forever," did not under the laws of that State vest in her an equitable separate estate. While the law of Alabama upon this point was in question, it must be conceded that the opinion, which was delivered by Mr. Justice Swain, proceeds upon the general law. He says in substance that this habendum is the common one in use in England and this country where the intention of the parties is merely to indicate ownership in fee-simple. Mr. Justice Strong dissented.

If the case at bar could not be distinguished from the case of Lippincott *vs.* Mitchell we should hesitate to ask the court to reopen the question there decided; but in this case the conveyance is one which was made for the purpose of transferring the title *from the husband himself* to the wife, and we submit that upon the reason of the matter and upon all the authorities the words "to her sole use" or "to her own use," or even "to her use," simply, must be held in such a conveyance to vest in the wife a separate estate.

When a married man voluntarily transfers to his wife, either directly or through a third person, any property, real or personal, it is but reasonable to conclude, whatever may be the language of the deed, if there be nothing in it

to evidence a contrary intention, that he means to give her the control of it.

As to personal property, in the absence of any statute, if this were not so, the title which he would transfer to his wife the law would immediately transfer back to him; and as to real property, if she do not by the transfer take a separate estate, the husband immediately becomes entitled to the use of the property as fully as before the transfer was made. His interest in it may be reached and sold by his creditors. The grantee can make no disposition of the property without his consent and concurrence. It will, indeed, in case of her death, pass by operation of law to her heirs, subject to his tenancy by the curtesy if there be a child born of the marriage. But if the purpose of the husband be to vest the title in the heirs of his wife, he could do so without making her a conduit. The only case in which the transfer will have any effect at all will be when the wife survives the husband, in which case her right of disposition becomes absolute; but if that were the sole object of the husband, it could be accomplished by devising the property to his wife by his will. The presumption must be that he intends the transfer to have some effect at once, and that intent can only be carried into effect by vesting in her a separate estate.

A similar question is presented when an antenuptial settlement is made in the wife's favor either by her prospective husband or by somebody else.

In all such cases the authorities seem to be uniform that a separate estate is created unless a contrary intent clearly appears.

In *Ex parte* Ray, 1 Madd. Ch., 115, a woman who was about to marry conveyed her entire estate (consisting entirely of personal property) to trustees "for her own sole use, benefit, and disposition." It was held that this gave her a separate estate. The court said:

"The doubt arises, in this case, on the construction of words in a settlement, and they must be explained, if necessary, by the context. All that this lady had she settled; and there appears an intention to exclude her intended husband. Taking the words '*sole use*' by themselves, they must have the same meaning as 'separate use.' Omitting the word *sole*, the property would go to the husband, but I am not at liberty to reject that word. '*Sole*' means solely hers—for her sole benefit. It is an emphatic and operative word.

"I admit that a husband's marital right cannot be taken away but by a clear intention; but here, I think, the intention is clear. The master of the rolls has decided on the effect of these words in the case alluded to, of Adamson *vs.* Armitage, and that they pass a separate estate.

"It is true that in other parts of the will where a separate estate is given other words besides the word '*sole*' are used, but that is only a redundancy of expression.

"The courts have gone a great way in abridging the marital rights of the husband. Money given to the husband '*for the livelihood of the wife*,' and money directed '*to be paid into her proper hands*,' has been held to pass as separate estate.

"This must be considered as the separate estate of *Mrs. May*, and an order made accordingly."

In Steel *vs.* Steel, 1 Ired. Eq., 452–456, it was held that a gift of chattels by a husband to a trustee for the use of the wife necessarily implies a separate estate in the wife, since otherwise the gift would be void, as the title to the property would immediately again vest in the husband. In Good *vs.* Harris, 2 Ired. Eq., 630, a conveyance of personal property by a married man to a trustee for the use, maintenance, and support of his wife and her children was held to create a separate estate.

In a deed from a husband to his wife, after reciting that he was leaving home, and that he wished to provide a permanent abode for his family if he failed to return, and "to provide against confusion at all events," he simply "granted" his entire estate to his wife in fee. It was held to

be the settled doctrine that a conveyance by a husband to his wife, either directly or through a trustee, is presumed to be for her separate use, although words are not used which would be necessary to have that effect in a conveyance from a stranger. (Sayers *vs.* Wall, 26 Gratt., 354–374.)

In Harshberger's Adm'r *vs.* Alger, 31 Gratt., 52–61, it appeared that a husband and wife, having agreed to separate, united in a deed to a trustee of certain real estate "for the express use, support, and maintenance" of the wife. By the agreement between them she renounced any claim on her husband for her maintenance and support. After questioning the validity of such a separation deed, the court held that if valid it created a separate estate, saying: "Otherwise it would be ineffectual for the purposes manifestly contemplated."

So in Leake *vs.* Benson, 29 Gratt., 53, it was held that a conveyance by a husband to his wife for her life, whether directly or through a trustee, is presumed to be for her separate use.

This doctrine was again confirmed by the court of appeals of Virginia in Garland *vs.* Pamplin, 32 Gratt., 305–314.

In a case in Kentucky, precisely similar to Harshberger's Adm'r *vs.* Alger (31 Gratt., 52), that case was followed. In the Kentucky case the words were "in trust for the use and benefit of." Both real and personal property were involved. (Gaines's Adm'x *vs.* Poor, 3 Metcalfe, 503.)

In Deming *vs.* Williams, 26 Conn., 225–230, a case in which personal property only was involved, the court say it is well settled that a gift or conveyance from the husband to the wife is held to be for her separate use without the use of words which would be necessary for that purpose if the gift were from a stranger, and this upon the ground that otherwise the gift would be inoperative.

In Whitten *vs.* Whitten, 3 Cush, 191–199, a husband had given a power of attorney to his wife to demand and receive "to her use" any money, etc., coming to him. In another

part of the instrument the words used were "to her own individual use." This language was held to create a separate estate. With the money which she had collected under the power of attorney the wife had bought lands, and the question arose in an equitable action begun by the husband's heirs, in which they set up a resulting trust in the husband's favor. In the course of the opinion this language is used:

"But cases which turn upon the general doctrine that a gift to the wife is a gift to the husband do not apply to this case, which is a grant by the husband himself to the wife. The doctrine that a gift to the wife is a gift to the husband cannot apply where the husband himself makes a gift or grant to the wife, which surely cannot be taken as a gift or grant to himself. Besides, in all cases where the intention to give a separate property to the wife is manifest, that intention is to be carried into effect, and where the husband himself makes a gift or grant to the wife, the intention to relinquish his own rights in favor of the wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocally manifested and declared. The cases, therefore, which have been referred to, to show that expressions such as those used in the power do not create a separate property in the wife, cannot apply to this case, while by these terms, as between the husband and wife, the intention of the husband to give a separate right and interest in the property to the wife is unequivocally declared, and such intention, by all the authorities, is to be carried into effect."

Other cases upon this subject will be found in White and Tudor's Leading Cas. in Eq., p. 733 (4th Am. from 4th London ed.); note to Hulme *vs.* Tennant. It is there said:

"This principle was overlooked in Bowen *vs.* Sibree, 1 Bush, 112, but would seem to be indisputable."

In the leading case referred to above of Massy *vs.* Rowen, L. R., 4 Eng. & Ir. App., 288–297, in discussing the effect of the word "sole" in a conveyance to a married woman, Lord Chancellor Hatherly says that in a marriage settlement such

language does exclude the husband, and that it also excludes him in any case of the devolution of property upon a single woman at a time when she is about to marry, unless something further appears to show a contrary intention; and he adds:

"In all these cases the word 'sole' finds its ready and appropriate meaning in its being a provision to secure the property against the control of the husband, and to give to her the sole and absolute disposal of it."

In the case of Lippincott *vs.* Mitchell in this court (94 U. S., 767) the conveyance in question was not made either directly or indirectly from the husband nor in contemplation of the grantee's marriage. On page 4 of the brief for the appellee in that case the distinction upon which we now rely was noticed and the attention of this court called to the fact that the conveyance in question was from a stranger, not from the husband, in this language:

"This deed is made to her by a stranger, not by one of her kindred who might be supposed to have some solicitude to provide a separate estate for her by the terms of the deed."

We respectfully submit that there is no escape from the conclusion that when Abram Elkin conveyed the real estate in controversy to his wife, through her brother, to and for her sole use, benefit, and behoof, he gave her a separate estate.

It is true that the right of a married woman, when she holds real estate to her separate use, to dispose of it by deed or will, is a right established by courts of equity.

And the Court of Appeals seems to have been of the opinion that although the defendant might be entitled to hold the property against the plaintiff because of certain equitable considerations, yet she could not set up that defense in an action of ejectment. Mr. Chief Justice Alvey says in this connection:

"How a court of equity might consider and deal with the facts of the case is a question that we are not called upon to determine in this action" (32).

Yet this precise question has been determined by this court in three cases. In City of Cincinnati *vs.* Lessee of White, 6 Pet., 431, it was held that an owner of land by acts and conduct which amounted to a dedication thereof to the public precluded himself from recovering possession of the same, even in an action at law. In Dickerson *vs.* Colgrove, 100 U. S., 578, the defendant in ejectment relied solely upon an equitable estoppel, and the question was distinctly presented to the court whether such a defense was available at law or must be set up in equity. It was held that the defense must prevail even in an action at law, the court saying:

"The common law is reason dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths.

"The passage of a title by inurement and estoppel is its work without the help of legislation. We think no sound reason can be given why the same thing should not follow in cases of estoppel *in pais* where land is concerned. * * * Whether the title passed or not, the fact that the plaintiff was not entitled to possession of the premises was fatal to the action."

In the case of Kirk *vs.* Hamilton, 102 U. S., 68, Dickerson *vs.* Colgrove was approved and followed. That also was an action of ejectment. It was held that the plaintiff could not recover, because a void sale of the property in controversy had been affirmed by him by disputing the right of certain of his creditors to be paid out of the proceeds of the sale, and by remaining silent while the purchaser expended large sums in improvements upon the property.

2. *The evidence in the case at least justified the submission to the jury of the question whether Mrs. Elkin's husband had not consented to the making of this particular will, or acquiesced in it after her death; and if he did either, the will was valid even as to real estate.*

The will bears date April 22, 1876, four years after the real estate in controversy was conveyed from Elkin through Calvert to Mrs. Elkin, and only eleven days before Mrs. Elkin's death (10, 12, 15). She died May 3, 1876, and Calvert qualified as executor on the 8th day of June, 1876 (11), the will having been admitted to probate in the meantime. A few days after Mrs. Elkin's death, Elkin went to the executor and wanted to borrow money from him, saying that he "was not willing to wait for the thousand dollars." Thereupon Calvert advanced him something over two hundred dollars. This was long before the sale of the property to Mrs. Hamilton, which occurred in February, 1879 (8). At the time of this transaction Elkin told the executor that his wife had given him money towards paying for the property, and that he, Elkin, "wanted to get something to get out of town" (19). It will be seen hereafter that it is admitted on all hands that upon getting this money from the executor Elkin left the city and has never returned.

In this connection it is to be remembered that when this property was conveyed from Elkin, through Calvert, to Elkin's wife Elkin had become insolvent and was being pressed by his creditors, and told Calvert at the time of the transaction that he wanted to make the property over to his wife for two reasons: (1) because she had helped him to pay for it, and (2) so that his creditors could not touch it, or something like that (19). All these things put together very clearly indicate that the arrangement between Elkin and his wife was that she was to give him by her will what he had put into the property, and she was to have the rest for her own uses and purposes; and when this agreement

had been carried into effect by her will he took, in advance of the sale of the property, a part of the proceeds thereof on account of his legacy, thereby ratifying in the most unmistakable manner what his wife had done in making the will. But, however this may be, we think no one will question that there was evidence sufficient to be submitted to the jury tending to show that Elkin had so far waived his marital rights as to consent to the making of this will and acquiesce in carrying it into effect after his wife's death; and, that being so, the will stands, even if the property conveyed in it was the wife's general property and not her separate estate.

"The wife's disability was due to the husband's marital rights; so that when such rights did not exist there was no disability." (1 Jar. on Wills, 39, note 1.)

After the husband has induced the executor under his wife's will to act under it he cannot dispute it. (1 Redfield on Wills, 25.)

As to personal property, the will of a married woman is good at common law if made in pursuance of an agreement before marriage, or of an agreement made after marriage on good consideration, or if the husband assented to the particular will and survived her. (1 Jar. on Wills, 40, and notes.)

The wife may make a valid will of personalty with the consent of her husband, good if he survives her. Though the will of a married woman when presented for probate is a mere nullity, yet if it is alleged to have been made with the consent of the husband the court assumes jurisdiction. The consent must be to the particular will, which consent may be inferred from circumstances. "If, after his wife's death, he [the husband] acts upon the will or once agrees to it, he is not considered at liberty to retract his consent afterwards and oppose the probate." (Schouler on Hus. & Wife, sec. 458.)

This rule is general in the United States. (*Id.*, sec. 459.)

If the husband acts on the wife's will or agrees to it after the death of the wife, he is not at liberty to retract. (1 Jar. on Wills, 39.)

The leading case in this country on this subject is Bradish *vs.* Gibbs, 3 Johnson's Ch., 519. In that case a man prior to his marriage had entered into an agreement with his prospective wife that she should have power during the coverture *to dispose of her real estate by will.* A will of real estate made by her during coverture in favor of her husband was enforced in equity, her heirs being required to convey to the husband the legal estate which had descended to them on her death. Chancellor Kent reviewed the authorities, English and American, and held that in equity the will was valid because of the husband's consent, though otherwise it would have been void, and even with the husband's consent was void at law.

Another case frequently cited and approved on this point is Cutter *vs.* Butler, 25 N. H., 343, 359, 360. That was an action of trover brought by the husband claiming his deceased wife's personal property. The wife had left a will which had been admitted to probate, under which the defendant claimed. It was held that the consent of the husband to the will might be shown by circumstances, as, that, when the inventory was made, he pointed out articles as belonging to her; and it was further held that his consent once given could not be retracted. The court also strongly intimates that the judgment of the probate court admitting the will to probate was conclusive as to the husband's assent, saying:

"If the husband designs to controvert either of these things [his assent to the will or his assent that particular property should pass by it] the time and place appointed for that purpose by the law would seem to be the courts of probate at the time of the allowance of the will and not after nor elsewhere."

In Fisher, ex'r, *vs.* Kimball, 17 Vt., 323–328, it was held (per Redfield, J.), on appeal from a decree of a probate court, that the fact that a husband had given written consent to his wife's making a particular will validated it, even though it would have been invalid without such consent.

In Wagner *vs.* Ellis, 7 Pa. St., 413, it appeared that the husband had consented to the making of the particular will, and it was held on that account good as to both real and personal property. It appeared in that case that the wife left no near relatives, and that the husband was himself her heir.

It has sometimes been said that the consent of the husband cannot make valid a wife's will of real estate when the real estate is a part of her general property. This seems to be upon the theory that for some reason a married woman is incapable of making a will of real estate. We shall show below that this is an error; that coverture of itself has never had the effect of disqualifying a woman from making a will of either real or personal property; that, as to personal property, she could not bequeath it because it was not hers, but her husband's, and that as to real estate the statute of wills in England excluded her. Chancellor Kent's opinion, however, in Bradish *vs.* Gibbs, *supra*, is directly in point, the only property involved in that case being real estate.

But there is another consideration in this case which makes further inquiry into this distincton between the husband's consent to a will of personal property and his consent to a will of real estate unnecessary. Mrs. Elkin's will directs that all her property, real, personal, and mixed, shall be sold, and provides for the distribution of the proceeds of the sale.

"Nothing is better settled than this principle—that money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction

is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether money is actually deposited or only covenanted to be paid, and whether the land is actually conveyed or only agreed to be conveyed; the owner of the fund or the contracting parties may make land money or money land. The cases establish this rule universally." (Fletcher *vs.* Ashburner, 1 Brown Ch., 497, per Sir Thomas Sewell, M. R.; quoted as the law on this subject in 1 Pom. Eq. Jur., sec. 161.)

The same doctrine is laid down and the authorities cited in 1 Jar. on Wills, ch. XIX, beginning at marginal page 547.

In Perkins *vs.* Coughlan, 148 Mass., 30, a petition had been filed in the probate court for the construction of a will which directed land to be sold and the proceeds to go to the payment of debts. The court said:

"He [the testator] impressed upon the outlands their character of personalty, and the law will deal with the property as having this character at the time of his death."

Even where by the terms of the will the sale of real estate *may* be deferred by the executors for a term of years, the conversion into personalty is deemed complete immediately upon the death of the testator. (Underwood *vs.* Curtis, 127 N. Y., 523, 534.)

This doctrine to its full extent has been recognized and enforced by this court in Craig *vs.* Leslie, 3 Wheat., 563–577, and in Peter *vs.* Beverly, 10 Pet., 532–563.

Hence when Mrs. Elkin made this will and her husband assented to it, they, the owners of the entire title, legal and equitable, gave to the real estate the character of personal property, and when, after her death, he, in anticipation of the sale, received from the executor an advance on account of his share of that personal property, her heirs cannot be heard to say that the will must be judged as a will of real estate.

3. *By the statute law in force in the District of Columbia when the will in controversy was made, Mrs. Elkin had power to make the devise in question.*

The original English statute of wills (32 Hen. 8, ch. 1) first gave to the owner of a freehold interest in real estate the power to dispose of it by will. As amended by 34 and 35 Hen. 8, ch. 5, married women were expressly excluded from the operation of the former act (1 Jarman on Wills, 33; 3 Wash. on Real Prop., Book III, ch. VI, p. 680). These acts never have been in force in the District of Columbia. When the District was created by the act of 27 February, 1801, it was provided that the laws of the State of Maryland as they existed on that day should continue in force within the District (R. S. D. C., sec. 92; 2 Stat., 103, 104). On the 27th of February, 1801, the laws and regulations concerning last wills and testaments and cognate subjects in the State of Maryland were embraced in the Maryland act of 1798, chapter 101 (Kilty's Laws). By subchapter 1, sections 1, 2, and 3, of that act it was provided as follows:

"1. All lands, tenements and hereditaments, which might pass by deed, or which would, in case of the proprietor's dying intestate, descend to, or devolve on, his or her heirs or other representatives, except estates tail, shall be subject to be disposed of, transferred and passed, by his or her last will, testament or codicil, under the following restrictions:

"2. No will, testament, or codicil, shall be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the constitution or laws of the State.

"3. No will, testament or codicil, shall be good and effectual for any purpose whatever, unless the person making the same be, at the time of executing or acknowledging it as hereafter directed, of sound and disposing mind, and capable of executing a valid deed or contract. No will, testament or codicil, shall be good and effectual to pass any interest, or estate in any land, tenement, or incorporeal hereditament, unless the person making the same, if a male, be of the full age of twenty-one years, and if a female, of the full age of eighteen years."

This act of 1798 is entitled "An act for amending and reducing into system the laws and regulations concerning last wills and testaments, the duties of executors, administrators, and guardians, and the rights of orphans and other representatives of deceased persons." Its opening sentence is as follows:

"Whereas the laws and regulations relative to the estates of deceased persons, comprehending a great variety of subjects, and interesting to citizens of every description, not only are become complicated and difficult to be understood, but are found by experience to be greatly inadequate to the purposes for which they were framed;

"II. *Be it enacted, by the General Assembly of Maryland,* That every provision, rule or regulation, contained in any act of assembly heretofore passed, *or in any English statute introduced, used or practiced under, in this State,* which is inconsistent with, or repugnant to, anything contained in this act, be and it is hereby repealed and rendered utterly void and of no effect."

In "Kilty's Report of the English Statutes in Force or Applicable in Maryland" he includes the two English statutes above referred to in his list of statutes "found applicable, but not proper to be incorporated." On page 163 he says the 14th section of the act of 34 Hen. 8, ch. 5, declares that wills made by any woman covert or person within the age of twenty-one years, idiot, or person of non-sane memory, shall not be taken to be good or effectual in law, and he adds, as a conclusion of his own, that in the Maryland testamentary law women covert are not by name incapacitated, but that they must be considered as excluded, because they are not capable of making a valid deed or contract.

In the preface to Alexander's British Statutes in Force in Maryland (1870) the history of Kilty's work above referred to is given. It will be seen that while Kilty's collection and classification of the British statutes was made under authority of an act of the Maryland legislature, his report was never formally approved and adopted. Alexander gives

in his work all the British statutes which Kilty had found applicable and proper to be incorporated in the laws of Maryland, and in addition several other statutes which were subsequently declared by the court of appeals of Maryland to be in force in that State, but he does not insert the English statute of wills or make any reference to it.

The earliest published statutes of Maryland are collected in Bacon's Laws of Maryland, published by Jonas Green in 1765. This volume begins with the statutes passed at the General Assembly begun on the 25th of January, 1637, and in the note Bacon describes this assembly as "the first of which any record appears in this province," and it includes all the statutes passed up to and including the 26th of November, 1763.

The next published statutes are found in Hanson's volume of statutes, published in 1787 under the act of 1784, which provided that Mr. Frederick Green, printer to the State, be directed to collect and print all the acts of assembly then in force passed since the 26th of November, 1763, to the end of that session of the assembly, under the direction of Alexander C. Hanson and Samuel Chase, and that volume comprehends all the statutes passed up to that date.

Kilty's Statutes extend to the 3d of January, 1800.

A careful examination of all of these Maryland statutes reveals the fact that there never was any statute of the province or State of Maryland authorizing lands to be passed by will or defining the mode of execution of wills of land or the qualifications of testators until the act of Assembly of Maryland of 1798, chapter 101. (Volume 2, Kilty's Laws of Maryland.)

The right to make wills of lands is recognized as early as 1715, when, by the second section of the act of that date (chapter 39), it is provided that the commissary general shall—

"take the probate or cause to be proved any last will or testament within this province, although the same cou-

cerns titles of land; any law, statute, usage or custom to the contrary notwithstanding."

The right to devise by will is again recognized in the twelfth section of the act of 1777, chapter 8, in which it is provided that if a testator—

"shall have devised any lands by a will in writing, then such will shall be proved in the orphans' court of that county wherein such lands shall lie."

The right to make a will devising lands thus recognized could only refer to the power given by 32 Hen. VIII, ch. 1, explained by 34 Hen. VIII, ch. 5, and as to these statutes Kilty, in his report made in 1810, twelve years after the act of assembly of 1798, ch. 101, above referred to, says (Kilty's Report of Statutes, 163):

"It is not thought necessary to attempt a more particular description of these statutes, because, although they undoubtedly extended to the province and continued in force in the State before the testamentary law, it is considered that (supposing them not repealed thereby) it is not necessary that they should be incorporated, etc., in addition to the comprehensive provisions that are made in that law."

When Chancellor Hanson drafted the act of 1798, ch. 101, he must have had before him the English statutes of wills of Henry VIII, and the assembly must be presumed to have had in mind the provisions of those acts when they adopted the language of his draft of the statute of 1798, ch. 101, declaring that—

"*every provision* * * * in *any* English statute, introduced, used or *practiced under* in this State, which is inconsistent with, or repugnant to, *anything* contained in this act, be and it is hereby repealed and rendered utterly void and of no effect."

This statute then proceeds, and for the first time in the history of legislation in Maryland expressly authorizes devises of

land by will, prescribes the mode of execution, what may be devised, the estates which may be created, the personal qualifications of testators, and, in short, covers the entire subject of testamentary disposition of lands.

The particular language employed in the first three sections of this act is worthy of special consideration. It confers in the amplest terms the power of disposition of lands by will without restrictions as to persons or estates.

The first section is confined to a description of what may be devised and by what form of testamentary paper, and seems to have been framed with more especial reference to unrestricted comprehensiveness than anything else.

Thus by the express terms of the first clause "all lands, tenements, and hereditaments which might pass by deed" is thus generally described and made devisable by will.

If, however, for any reason an estate was not subject to be conveyed by deed, the power to devise was yet conferred by the next clause, still more comprehensive in its language and disjunctively used in this section, by the words:

"*or* which would, in case of the proprietor's dying intestate, descend to, or devolve on his or her heirs or other representatives."

In describing the manner in which testamentary disposition of land may be made, the same liberal purpose of the legislature is shown by the terms employed in the next clause, namely:

"shall be subject to be disposed of, transferred and passed by his or her last will, testament or codicil."

Thus by this section any interest in land over which the proprietor had the power of conveyance or which could pass by descent might be disposed of by will by such proprietor without exception or reservation of any kind by a "last will, testament or codicil."

The second section is confined to a limitation of the estates

which may be created, and prohibits any perpetuity or other estate not then permitted by the constitution and laws.

The third section is confined to the qualifications of devisors, and imposes but two limitations (*a*) testamentary capacity—that the party shall be of sound and disposing mind and capable of executing a valid deed or contract—and (*b*) age—that if a male he shall be twenty-one, and if a female, eighteen.

It was suggested by Chancellor Kilty that the capacity to execute a valid deed or contract excludes a married woman, but this suggestion is readily answered.

In the first place, it is most obvious from the context and association that this language is used as descriptive of the *mental* capacity, not the *legal* capacity, of the devisor.

In the next place, the only persons who could be said to be incompetent to execute a valid deed or contract would be infants, persons of unsound mind, and *femes covert*. Age and mental soundness are in terms provided for. It is unreasonable to suppose that coverture alone was intended by the vague phrase "capable of making a valid deed or contract." And if the provision be construed to relate to coverture, the careful and separate designation in the first section authorizing devises of lands which could pass by deed *or* by descent would become meaningless.

The conclusion is therefore inevitable that it was the clear purpose of this act to ignore and repeal the exception of *femes covert* in the statute of Henry VIII.

In several States it has been held that where several classes of persons are excepted from a general grant of the right to dispose of property by will, and married women are not included in the exceptions, they become vested with the power to make a will, notwithstanding the existence of a prior statute expressly excluding them. Leading cases on this subject are Allen *vs.* Little, 5 Ohio, 65; Noble *vs.* Enos, 19 Ind., 72, and Bennett *vs.* Hutchinson, 11 Kan., 399, per Brewer, J.

In the case above cited of Fisher, ex'r, *vs.* Kimball, 17 Vt., 323–328, in which it was held that the husband's consent made the will of a married woman valid, Judge Redfield states at the conclusion of the opinion:

"As our statute expressly excepts from the right of making wills persons not of full age and sound mind, it is supposed by many that it must include married women. Judge Reeves seems to take this view of similar statutes, and if it were necessary I think very good reasons might be urged in favor of that view."

The subject of the power of married women to make wills is discussed with great learning and ability by Judge Reeves in his work on "Domestic Relations," in chapters XI and XII. He shows the error of the doctrine sometimes laid down that a married woman is absolutely disqualified from making a will by reason of her coverture in the same way that an idiot is disqualified from want of mental capacity. He reaches the following conclusions:

1. That from the time of the Norman conquest until the statute of 32 Hen. 8, ch. 1, ~~real estate~~ interest in real estate a freehold in England could not be devised at all.

2. That what little can be ascertained as to the Saxon law on this subject before the advent of the Normans indicates that a married woman could devise both real and personal property.

3. That after the statute of 34 Hen. 8, ch. 5, was enacted a married woman could not devise real estate because she was excepted from its provisions.

4. That at common law the husband was the owner of the wife's chattels, and she could not devise them simply because she did not own them, not because of any inherent incapacity to make a will.

5. That the husband could always waive his marital rights and allow the wife to bequeath her personal property, the bequest in such case operating as a gift from him.

6. That this and numerous other instances in which the will of a married woman is sustained show that there was no disability resulting from coverture merely.

7. That the English statute of wills is not in force in this country, the subject here being universally regulated by local statutes.

8. That as the Connecticut statute of wills did not in terms exclude married women, they had the right to make a will.

In the case of Cutter *vs.* Butler, 25 N. H., 343–353, the exceptions to the rule that the will of a married woman is void are collected and shown to be as follows:

1. When she acts in *autre droit*, as executrix.

2. When the husband is banished from the realm.

3. When she holds personal property in trust, subject to her appointment.

4. Under an antenuptial agreement with the husband as to a will of personalty.

5. As to chattels real, by the assent of the husband.

6. As to choses in action, by the consent of the husband.

7. As to chattels generally when the husband waives the right to them.

8. In any will of personal property the husband, though not having consented beforehand, may acquiesce, and the will is good.

As to the act of Congress commonly called the married woman's act (which is quoted in full on page 3 of this brief), it is obvious that the purpose of that statute was to give to married women certain rights which they did not have before, and that if the right of making a will in certain cases existed before that statute, that statute did not take it away. It is submitted therefore, upon this branch of the case, first, that coverture does not of itself disqualify a woman from making a will; second, that the English statute of wills, so far as it excepts married women, never was in force in this District; third, that the Maryland act of 1798, in express terms, gave to all women over eighteen years of age, married or unmarried, the right to make a will of real estate; and, fourth, that no subsequent legislation has taken away that right in this District.

Our next contention is that even if, under the statutory law of the District of Columbia prior to the passage of the married woman's act, Mrs. Elkin was not empowered to make the will in question, that right was conferred upon her by that statute as originally enacted. It gave the right to every married woman to devise and bequeath her property or any interest therein, except such as she acquired "by gift or conveyance from her husband." In the case of Sykes *vs.* Chadwick, 18 Wall., 141, this court held that by the words "gift or conveyance from her husband," in the act of 1869, is meant *voluntary* gift or conveyance, and that where a husband conveys property to his wife for a valuable consideration the exception does not apply, and the wife, by virtue of the statute, may devise the property so transferred to her "in the same manner and with the like effect as if she were unmarried."

The evidence in this case shows very clearly that Elkin was a worthless fellow, and that his wife was the mainstay of their little family. His conduct after the death of his wife, which will be referred to below, sufficiently indicates this. He had been a clerk in one of the departments, a

hotel watchman, proprietor of a little grocery store, and a vendor of peanuts and bananas (22). The deed from Elkin to Calvert and the deed from Calvert to Mrs. Elkin each recites a consideration of five dollars, and that was probably all the money that passed at the time (13, 12, 21); but Calvert testifies that at the time these conveyances were made Elkin informed him that his wife had helped him to pay for the property or given what money she had; that Mrs. Elkin had some money which her father-in-law had sent her at different times, and had accumulated some little money by doing fancy work; that Mrs. Elkin had helped her husband to pay for the house which they built on the land after they bought it, and that Mrs. Elkin had spoken to him (Calvert) several times about the matter before the property was actually deeded to her (19, 20). It appeared also that when Mrs. Elkin would receive letters from her father-in-law containing money her husband would open them and take the money out, and that when she had any money she had to hide it in her stocking (20).

Mary J. Lowry, who was the sister of Mrs. Elkin and Mr. Calvert, testified that Mrs. Elkin's father-in-law sent his daughter-in-law money at different times, the witness having seen several of the checks; that Mrs. Elkin kept the money in her stocking; that Mrs. Elkin used also to earn money by sewing; that Mrs. Elkin gave her husband money to help pay the notes he gave for building the house on the land, and that Elkin would take from his wife money which was sent to her for the benefit of her children (22, 23).

The testimony of these witnesses for the defendant was corroborated by Mrs. Ellis, a witness for the plaintiff, who testified that Mrs. Elkin on several occasions had given her money to keep which Mrs. Elkin had received from her father-in-law, Solomon Elkin (27).

The Court of Appeals considers the evidence here recited as requiring little attention from it. That court assumes that the amounts which Elkin received from his wife were

small and were given to him "to aid in paying for the building of the small house that was erected on the land" (30). We respectfully submit that this evidence was sufficient to entitle the defendant to have the jury say whether upon the whole case they were satisfied that the conveyance of this property through Calvert to Mrs. Elkin was without consideration. In the nature of things it was impossible, after such a lapse of time and after the death of the two principal parties to the transaction, to show just what amount of money Mr. Elkin had received from his wife. But the payments that were proved and the testimony showing that Elkin was a worthless, improvident man and his wife a frugal, careful housewife, earning money by her own work and receiving money from her father-in-law, with Calvert's testimony as to what took place when the deeds were made, to say the least, left it a question whether or not they were made because Mrs. Elkin's money had bought the land or had materially contributed to its purchase and to the building of the house. It was not necessary to show that Mrs. Elkin paid full value for the property. If there was any valuable consideration moving from her, then, under the decision of this court in Sykes *vs.* Chadwick, she held the property as her statutory separate estate and could convey it by deed or will, as she pleased.

It will probably be contended that the money which Mrs. Elkin earned, as well as that which she received from her father-in-law, became the property of her husband, and that his receiving what already belonged to him would not furnish a good consideration for the transfer of this land to his wife; but we have already shown that the law does not compel the husband to take the wife's chattels. He has the right to take them, but that right he may waive.

Moreover, the conveyances by which the title to the property was vested in Mrs. Elkin were not made until April, 1872, three years after the married women's act had become the law of the District, and under that statute all the money

which she received from her father-in-law became her separate property. This money of itself would have furnished a valuable consideration for the transfer of the title to the real estate to her; and when her husband received from her the money so sent to her by his father the presumption arises, even without any aid from the testimony, that he received it as her trustee and under an obligation to account to her for it (Stickney *vs.* Stickney, 131 U. S., 238). As to her earnings, it is true that under the decision of this court in Seitz *vs.* Mitchell, 94 U. S., 580, her husband would have had the right to claim them, but it is equally clear that that right he could waive. The court in that case, referring to the wife's earnings, say:

"She can have them only by the gift of her husband, and such gift is not protected against his creditors."

But having given them to her, they became a valuable consideration for a conveyance from him to her, and his entire conduct, as evidenced by the testimony above referred to and by his subsequent affirmance of and acquiescence in the will and the sale made under it, shows that what money he received from his wife he received not under any claim of right, but in such a manner as to impose upon him the same obligation that would have been imposed upon anybody else who had borrowed it.

But whatever may have been the proper construction of the married women's act of the District in this respect as originally enacted in 1869, the case becomes perfectly clear when we consider the change made in the wording of that statute when it was incorporated in the Revised Statutes of the District of Columbia in 1874. From a comparison of the original act with the corresponding sections of the Revised Statutes (see pages 3 and 4 of this brief) it will be seen that the first section of the original law, which contained a single sentence, was thrown in the revision into two separate and distinct sections—727 and 728. And

while by the original law the power of a married woman to devise property was limited to property which she had acquired otherwise than by gift or conveyance from her husband, in the revision she was given the power without qualification to devise "her property or any interest therein."

Unless when read by itself there is some ambiguity in section 728 of the revision, the original statute cannot be taken into consideration in construing it, and we submit, with all deference to the court below, that there is no ambiguity in the language of this paragraph. Both in its legal and in its common acceptation the word *property* is broad enough to include everything that one person can own and transfer to another. (19 Am. and Eng. Enc., 283–285; Black's Law Dict. and Anderson's Dict. of Law—word property.)

The deed from Calvert to Mrs. Elkin conveys the land described in it to her in fee-simple. It is conveyed to her "and her heirs and assigns forever." It is to be held unto her, "her heirs and assigns, to her and their sole use, benefit and behoof forever" (9). This certainly made the land conveyed "her property."

Much light is thrown upon this question by an act of Congress approved June 1, 1896 (29 Stat., 193), entitled "An act to amend the laws of the District of Columbia as to married women, to make parents the natural guardians of their minor children, and for other purposes." The sections of that act which are pertinent here are as follows:

"That the property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and real, personal, or mixed property which shall come to her by descent, devise, purchase, or bequest, or the gift of any person, shall be and remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts, except that such property as shall come to her by gift of

her husband shall be subject to, and be liable for, the debts of the husband existing at the time of the gift.

"SEC. 2. That a married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property, and she may, by a promise in writing, expressly make her separate estate liable for necessaries purchased by her or furnished at her request for the family.

* * * * * * *

"SEC. 11. That sections seven hundred and twenty-seven, seven hundred and twenty-nine, and seven hundred and thirty of the Revised Statutes of the United States for the District of Columbia, be and the same are hereby repealed."

The first section of the above act changes the law by making a married woman's property her separate estate, whether it comes from her husband or not. The second section authorizes a married woman to "bargain, sell, and convey" her property, omitting the words "devise and bequeath," in the earlier act. But by section 11 of the later act sections 727, 729, and 730 of the Revised Statutes of the District are repealed, leaving section 728 in full force and effect. Obviously Congress understood section 728 to give to a married woman the power to devise and bequeath her property without limitation, and therefore allowed it to stand. But if that section has the restricted meaning which was given to it by the Court of Appeals in this case, the legislature has failed in its obvious intent. By virtue of the later act a married woman while living would have the same rights as an unmarried woman in her property, from whatever source derived, but she could not dispose of it by will if it came from her husband.

Of course we know that it is not in the power of Congress by a later statute to construe an earlier one so as to affect rights that have accrued in the meantime; but the fact that

those who prepared, evidently with great care, this important act of 1896, understood section 728 to give to a married woman the absolute right of disposing by will of all her property, and so did not change it, is very persuasive as to the natural import of the words used in that section. When the appellant purchased the land in controversy in 1879 the lawyer who examined the title for her (25) would naturally have looked at section 728 if he was not already familiar with it, and he would have found nothing in it to suggest to him a doubt as to its meaning that would impose upon him the duty of looking back to the original statutes. He had a right, therefore, to assume that it meant what it said; otherwise the Revised Statutes would be worse than useless. They might mislead, but could never aid, the searcher for the law.

And there was a good reason for this change in verbiage when section 728 was drawn over and above the general tendency to the emancipation of married women from the restraints as to their property rights imposed by the common law. We have seen that under the Maryland act of 1798 married women had the right to devise their real estate. It had, no doubt, been otherwise construed in some extra-judicial opinions. The language of the original act of 1869 gave color to this construction and might seem to take away the right when property came to the wife from her husband.

But whether the reason was good or bad, the change was made, and, like hundreds of other changes in the revision, must be given its full effect.

"The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise when there are cogent reasons for believing that the letter does not fully and accu-

rately disclose the intent. No mere omission, no mere failure to provide for contingencies which it may seem wise to have specially provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Holy Trinity Church vs. United States*, 143 U. S., 457). It involves no injustice, oppression, or absurdity (*United States vs. Kirby*, 7 Wall., 482; *McKee vs. United States*, 164 U. S., 287). There is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other."

U. S. *vs.* Goldenburg, 168 U. S., 102, 103.

"It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts rather than an intention to give it, and a mistaken opinion of the legislature concerning the law does not make law; but if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

Postmaster General *vs.* Early, 12 Wh., 148.

A case strikingly illustrating the position for which we are now contending is United States *vs.* Bowen, 100 U. S., 508–513. As the law stood prior to the revision, all pensioners were required to give them up on entering the Soldiers' Home at Washington; but in the revision, by the interpolation of the words "all such," the law was changed so as to provide that only those pensioners should be required to surrender their pensions on entering the home *who had not contributed to it.* It was held in that case that the language under consideration as it stood in the revision was plain, and that the original act therefore could not be referred to in construing it; and the court adds that there was a good reason for the change, since those who had by deductions from their pay or otherwise contributed to the

building of the home were entitled to go there when old and disabled without being required to give up their pensions.

In that case a general provision in the original act had been limited in its operation to a certain class by the insertion of the word "such." In this case a particular provision has been made general by omitting the words "the same." The language of the revision involved here is certainly as plain as that which was under consideration in United States *vs.* Bowen, and the reason for the change in this case is as obvious as it was in that.

United States *vs.* Bowen was approved and followed in Cambria Iron Company *vs.* Ashburn, 118 U. S., 54–57. In that case the court had under consideration section 639 of the Revised Statutes, which was taken from, but changed, the act of March 2, 1867 (14 Stat., 558). Mr. Chief Justice Waite, in delivering the opinion of the court in that case, said:

"There is nothing of doubtful meaning in this section. It is divided into three subdivisions, all relating to the removal of suits, but each providing for a separate class. * * * *Each subdivision is complete in itself and in no way depends upon any other.* Each describes the particular class of suits to which it relates and without reference to the others."

In Deffeback *vs.* Hawke, 115 U. S., 392–402, this court said:

"No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised Statutes when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision."

Finally, in the important case of Bate Refrigerating Company *vs.* Sulzberger, 157 U. S., 1–39, this court, in referring to the argument pressed upon it in that case that the re-

vision should be held to mean what the prior law meant, "unless a purpose to change and alter is manifested by clear, unambiguous language," said:

"The circumstances under which the courts may look at prior laws for which a revision has been substituted are stated in United States *vs.* Bowen, 100 U. S., 508–513. * * * For the reasons already stated, the principle announced in the cases just cited cannot avail the plaintiff if the existing statute is interpreted to mean what its words import according to their natural signification."

Again in the same case, at page 45, the court, in enforcing its conclusion that changes in the original law are presumed not to be mistakes, says:

"This presumption is strengthened by an examination of the act approved February 18, 1875 (18 Stat., 316). * * * That act upon its face shows that the entire revision of 1874 after it took effect was carefully re-examined for the purpose of ascertaining whether there were errors or omissions in the work of revision. Now, it is inconceivable that the difference * * * could have escaped the attention of Congress. * * * The act of 1875, for the purpose of correcting errors and omissions, amended or repealed nearly seventy sections of the Revised Statutes. Still further, as an examination of the statutes will show, since the Revised Statutes went into operation nearly eight hundred sections other than those referred to in the act of 1875 have been amended or repealed; but no amendment has ever been made of section 4887."

This argument applies with equal force to the Revised Statutes relating to the District of Columbia. An examination of Richardson's Supplement to the Revised Statutes 1874–1891, pages XVII, XVIII, will show that prior to November, 1891, about one hundred amendments had been made in them. These changes involved more than 200 of the 1,296 sections in that revision; yet not only has section 728 not been amended, but, as we have seen, it has recently been reaffirmed by repealing the other sections taken from the

married women's act of 1869 and allowing it to stand—allowing it to stand in such a way as to show that it was understood to give to a married woman the right to dispose by deed or will of all her property, however acquired.

The last section of the Revised Statutes of the District, section 1295, provides that all prior acts of Congress relating to the District, "any portion of which is embraced in the foregoing revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

In the opinion of the Court of Appeals in this case rendered on the first appeal reference is made to the case of Kaiser *vs.* Stickney, 131 U. S., Appendix CLXXXVII, as sustaining the conclusion reached by that court against the validity of Mrs. Elkin's will. There is no statement of the facts in that case accompanying the opinion in 131 U. S. The case, as decided in the supreme court of the District of Columbia, is reported in 3 MacArthur, 118. It there appears that the instrument, the validity of which was in question in that case, was a deed which was executed and delivered in September, 1867, before the passage of the married women's act of the District. Neither in the report of the case in 3 MacArthur nor in the report of the case in 131 U. S. is any statement made as to the briefs of counsel, nor even as to the points upon which the respective counsel relied; but upon examination of the briefs on file in this court we find that when the case was argued here on behalf of the wife, her counsel, Michael L. Woods and Belva A. Lockwood, themselves contended that the wife did not take under the deed to her either an equitable or a statutory separate estate. Their whole argument was based upon the proposition that the land involved in the case was a part of the wife's general property. The opposing counsel, Mr. Enoch Totten, in his brief did not controvert this view of the matter. Consequently the decision of

this court was put upon a state of facts admitted to exist by the counsel in that case. The whole question was disposed of by Mr. Chief Justice Waite in a single sentence. We submit that, even if the facts in that case were like the facts in the case at bar, the rights of other parties could not be affected by the concession of counsel in that case that Mrs. Kaiser did not have a separate estate. Besides, in that case the question was whether a deed was valid which had been jointly executed and acknowledged by the husband and the wife, the wife's acknowledgment being taken privily and apart from her husband, as required by the statutes of the District of Columbia governing that subject. Such a conveyance was unquestionably good, whether the property was a part of the wife's general property, an equitable separate estate, or a statutory separate estate. The only question really involved in the case was whether the wife was bound by a mortgage which was given to secure her husband's debt, and the mortgage which was in question was made in April, 1871 (3 MacArthur, 118), three years before the enactment of the Revised Statutes, and consequently before the wife had been given power generally to convey, bequeath, and devise "her property."

It is quite clear, therefore, that the Court of Appeals erred in relying upon Kaiser *vs.* Stickney as sustaining the contention that section 728 applies only to a married woman's separate estate.

If our view of this matter be correct, the jury should have been instructed to render a verdict for this defendant.

## II.

THERE WAS EVIDENCE SUFFICIENT TO GO TO THE JURY TO SHOW THAT THE PLAINTIFF BY HER CONDUCT HAD PRECLUDED HERSELF FROM QUESTIONING THE VALIDITY OF THE SALE OF THIS PROPERTY BY CALVERT TO THE DEFENDANT.

The defendant purchased the land in February, 1879, when the plaintiff was something less than fifteen years of age. By the will under which Calvert made the sale the proceeds, after deducting funeral and other necessary expenses and the sum of $1,000, which was to be paid to the testatrix's husband, Abram Elkin, were to be divided in equal shares between the plaintiff and the three other children of the testatrix (10). The land sold for $1,500, so that at the most there were but a few hundred dollars which under the will were to be divided among the children. Immediately after their mother's death these children were taken charge of by their mother's sister, Mrs. Lowry, who brought them up. Calvert, as executor, helped support them. He was able to find and produce in court receipts to the amount of $598.70 for money expended for these children (19). Mrs. Lowry testified that in addition he gave her $125 in money to pay for their board (22). They therefore received more than they were entitled to under the will. After the death of Mrs. Elkin, and before the property was sold, Calvert advanced $200 to Elkin on account of the $1,000 coming to him (19), and as Elkin then went away and never returned, this left a balance in the hands of Calvert, which he seems to have considered it his duty to apply for the benefit of Elkin's children.

Mrs. Lowry testified that the plaintiff knew the place was sold and knew the money was coming from that sale; that she talked about it and told Mrs. Lowry so (22).

Calvert himself testified that the plaintiff told him that

she knew he had sold the property, and asked him what she was entitled to; that this would happen when she would come to him for clothing and necessaries; that she made her demands in pursuance of such rights, and that when she came to see him she would say that he had money belonging to her and that she wanted it (21).

The defendant testified to a visit which she received from the plaintiff in the latter part of 1885. She fixed the date as after November 22, 1885, when defendant's daughter died (25). The plaintiff became of age in the preceding March (15). The defendant's testimony as to this was as follows:

"She came out and said to me, Mrs. Hamilton, you don't know me. She said, You don't know Abbie Elkin. I answered, You have grown out of my memory. She then said, Mrs. Hamilton, did you buy this place? I answered that I did. She said, Who did you buy it from? I said, I bought it from Mr. Calvert. She said, I don't see why my uncle Fred. had any right to sell papa's property. I said to her, If I understand it right, it is not your father's. She said, Well, mamma's, then. I said, I don't know anything about it. I had a lawyer attend to it. You had better go to him, and he will tell you all about it. That was the substance of the talk. That was before she was married. It was in 1885. She said her name was Abbie Elkin. She did not say that she did not know the property had been sold. She said she was getting a big girl now, and it was time she was getting some benefit.

"Q. Did she say she had gotten any benefit before that?

"A. She did not say."

In reference to this visit, the plaintiff testified that she went to see Mrs. Hamilton because her uncle told her there was no money; that he told her this, and she went to see the defendant, and that when she went to see the defendant she went to ask her about the property (26).

All this shows very clearly that after the plaintiff became of age she, with full knowledge of the sale and that there was a question as to its validity, went to Calvert and de-

manded her share of the proceeds of the sale. This would indicate an election on her part to let the sale stand, whether she actually received anything from Calvert after she became of age or not; and this conclusion is greatly strengthened by the fact that it was not till nearly six years after this visit to the defendant that the plaintiff took any steps towards recovering the property.

But the evidence went further. It at least tended to show that after she became of age the plaintiff, with full knowledge of all the facts, actually received from Calvert a part of the proceeds of the sale. Calvert himself said that he thought he bought things for her after she became of age (21). It is true that he added that she became of age in 1881, whereas she did not in fact become of age until March, 1885. But, in the same connection, he says that she said she was of age, and that she had a right to have the things. Certainly this amounts to saying that, according to his best recollection, he bought the things for her after she was of age. But the admissions of the plaintiff herself on this subject are still stronger. She admitted that at the first trial of the case she had testified that she was probably over twenty-one when she received a pair of shoes from Calvert (27). It was proved that at the first trial she did testify positively that she received the pair of shoes after she became of age (28). She qualified this at the second trial by saying that at that time she did not know whether she was of age or not; but the plaintiff's admission at the former trial, under oath, that she received the shoes after she became of age was certainly evidence to go to the jury as to whether that was true or not. We submit, therefore, that when the Court of Appeals say that the witness testified that she could not be positive "whether she was then of the age of twenty-one years or not" (32), they overlook the evidence as to her statement at the former trial, and assume to decide a question which it was the right of the defendant to have submitted to the jury.

True, a pair of shoes may be a small matter. But it is to be remembered that the plaintiff was one of four children, among whom, assuming the sale to be valid, there were to be divided a few hundred dollars. Her share could not in any event have exceeded one hundred dollars. Slight acts or short acquiescence are enough where the contract is executed (Tyler on Infancy and Coverture, 83, 84, 85). The price of a pair of shoes might be a very considerable proportion of the whole sum due her. But whether great or small, the receipt of a pair of shoes, added to the other benefits which had been conferred upon, and demanded by, the plaintiff in respect of her share of the proceeds of the sale, presented such a state of facts as in connection with her subsequent acquiescence for six years made it not unreasonable to conclude that the plaintiff, with full knowledge, had elected to claim under the sale and not adversely to it. The evidence tending to show a ratification after becoming of age was strengthened by the testimony showing that while still a minor the plaintiff had been in part supported by Calvert, and that she knew then of the sale. (Owens *vs.* Phelps, 95 N. C., 286.)

This subject of election and ratification was considered by this court in Robb *vs.* Vos, 155 U. S., 13, 39–43. In that case an attorney, without authority from the owners, had consented to the entering of a judgment against the owners and to the sale of the land under an execution issued upon the judgment. It was held that the owners had ratified the sale by filing a petition in the case setting up a claim to the proceeds of the sale, notwithstanding the fact that they withdrew the petition before they had received anything in pursuance of it. Mr. Justice Shiras, who delivered the opinion, cites the earlier case in this court of Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96, 114, in which it was held that a depositor whose checks had been fraudulently raised by his clerk lost his remedy against the bank merely by "delay and negligence in making known the facts to the bank, and thus

giving it an opportunity to seek restitution from the wrong-doer."

In the opinion of the Court of Appeals it is said (32) that—

"It is not pretended that the plaintiff by any act, conduct, or admission of hers caused or induced any change in the position of the defendant to her prejudice."

To this we reply in the language of this court in the above-mentioned case of Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 115:

"It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. * * * As the right to seek and compel restoration and payment from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and, it may be, effectively exercising it."

In this case the defendant had two possible remedies if the plaintiff had acted promptly when she became of age. She might have recovered from Calvert the money she had paid him, and she might have called to account the lawyer who had passed the title when she made the purchase. She was prevented from resorting to either of these remedies for at least six years after the plaintiff became of age, not merely by the negligence of the plaintiff, but, as the testimony tended to show, by the plaintiff actually demanding and receiving from Calvert a part of the very money which, if the sale was void, he could have been compelled to pay back to the defendant. (See Keegan *vs.* Cox, 116 Mass., 289.)

## III.

UPON THE EVIDENCE THE COURT SHOULD HAVE LEFT TO THE JURY THE QUESTION WHETHER THEY WERE SATISFIED BY THE EVIDENCE THAT ABRAM ELKIN WAS DEAD WHEN THIS SUIT WAS BROUGHT IN JUNE, 1891.

We have no occasion to controvert in this case the rule that when a man has disappeared *from his usual place of abode*, and has not been heard from for seven years *by those who would be likely to be informed of his whereabouts*, a presumption of his death arises. But we do contend that, in this case, it appeared that Abram Elkin left the District of Columbia immediately after his wife's death, in May, 1876, with no intention of ever returning, and under such circumstances that it would not be likely that he would communicate with those he left behind him; and that this being so, the fact that he has not returned and that he has not been heard from here left the matter in such a condition that it was, to say the least, a question for the jury whether such a state of facts had been shown as would give rise to the presumption of death.

Calvert testified that after Mrs. Elkin was dead and her children had been taken to his father's house he saw Elkin at the house where he had lived with his wife, selling off furniture and clothing; that he was selling his children's clothing; that a few weeks afterwards when the witness went to the house he found a note there in Elkin's handwriting to this effect: "Good-bye, Fred; I am going to leave town and not come back" (20).

William Holmead testified that he saw Elkin at about the same time selling his children's clothing and other things to a lot of colored people, and that Elkin then told him that the Calverts had taken his wife and children and he was going away—going to leave the city and leave his children

with the Calverts; that Elkin's feelings towards the Calverts were very bitter (23). And Mrs. Lowry testified that at about the same time Elkin told her that he was going away, and that he did not want to stay in the city (22).

The evidence further disclosed that Elkin's parents had separated; that Elkin had sided with his mother in her dispute with his father, and that the father for this or some other reason had practically disowned him. In a note, the date of which does not appear, Solomon Elkin, the father, replying to an inquiry as to his son's whereabouts, used this remarkable expression: "If it should be the one I know he is not worth looking at" (16). Mrs. Lowry also wrote to Solomon Elkin as to his son's whereabouts and received what she termed an "insulting letter." She said the father wrote that he had cast his son off; *that he heard his son was married, and that he and his wife had gone to England.* This was four or five years after the death of Mrs. Elkin (22). Being recalled, Mrs. Lowry testified that Solomon Elkin wrote to her that he had heard that his son "*had gone to England with his wife and mother*" (23).

The plaintiff herself testified to the contents of this letter from her grandfather in about the same terms (26). She said that this correspondence took place when she was about eighteen years of age. This was about nine years before this action was brought. The evidence does not disclose that any inquiries were made for Abram Elkin after that time. The case, therefore, is one in which a man is shown to have abandoned his domicile with the intention of giving it up permanently, leaving his children under such circumstances and in such a state of feeling towards them as indicated a purpose to abandon them, and a few years afterwards he is shown to have remarried and gone to England with his wife and his mother. We submit that this is not such a case as justified the court in saying to the jury that they were bound to find that the man was dead. Rather should

they have been told that upon such evidence they would not be justified in coming to such a conclusion at all.

All the authorities seem to agree that presumption of death does not arise because a person is not heard from for seven years at a place which he has definitely abandoned as his domicile and when the circumstances indicate that he would not be likely to communicate with any person there. Thus in Watson *vs.* England, 14 Sim., 28, 29, this language is used:

"Here a girl about 16 or 17 years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's house and to go no one knows whither. But it seems that in August, 1814, she was at Portsmouth and that she then intended to go abroad. Therefore it is but reasonable to presume that all along she had been concealing herself and that she never intended to return home.

"The mere fact of her not having been heard of since 1814 affords no inference of her death, for the circumstances of the case make it very probable that she would never be heard of again by her relations. How can I presume that she died in 1821 from a fact which is quite consistent with her being alive at that time.

"The old law relating to the presumption of death is daily becoming more and more untenable; for, owing to the facility which traveling by steam affords, a person may now be transported in a very short space of time from this country to the backwoods of America or to some other remote region where he may never be heard of again."

This subject is discussed in Lawson on Presumptive Evidence, chap. X. In his rule 53, page 237, he says:

"But the presumption of death * * * does not arise where it is improbable that the absentee, even if alive, would or could have been heard of at, or would or could have communicated with, his residence, home, or domicile."

In Miller's Estate, reported in 9 N. Y. Supp., 640, the surrogate of New York county had a case before him in which the

circumstances were very much like those in Watson *vs.* England, *supra*, and he reached the same conclusion. He said:

"The presumption does not arise where it is improbable there would have been any communication with home."

This case was affirmed by the supreme court of New York in general term mainly upon the surrogate's opinion. (See the case reported as "*In re* Taylor," 20 N. Y. Supp., 960; 66 Hun., 626.)

The general rule governing such cases as this was thus laid down by Mr. Justice Harlan, speaking for this court, in the case of Davie *vs.* Briggs, 97 U. S., 633:

"A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, *unless the circumstances of the case are such as to account for his not being heard of without assuming his death.*"

The rule is stated in precisely the same words in 1 Am. & Eng. Enc. (1st. ed.), 38.

In the case of Sensenderfer *vs.* Pacific Mut. Life Ins. Co., 19 Fed. Rep., 68, the jury were correctly instructed that the absence of the insured, the failure to learn of his whereabouts, the attraction of his family and his not returning to it, his business relations, and his character and standing were all to be taken into consideration as indicating his death; but that the testimony relating to his financial condition, as indicating that that might have induced him to abscond, and other evidence pointing in the same direction, should receive proper consideration at their hands, and that "whatever bearing the testimony or the circumstances of the case present, calculated to weaken or destroy the probabilities of the death of La Force, introduced by the defendant, should be carefully considered by you in connection with the testimony introduced by the plaintiff in support of the conclusion of his death."

Other instructive cases upon this subject are McMahon *vs.* McElroy, Irish L. Rep., 5 Eq., 1; *In re* Smith, 31 L. J. (new series), P. & M., 182; Dowden *vs.* Henderson, 2 Sm. & G., 360; *In re* Tobin, 15 N. Y. St. Repr., 749 (surrogate's court, N. Y. Co.); Smith *vs.* Smith, 49 Ala., 156, and Gray *vs.* McDowell, 6 Bush., 482. See also a long note upon the subject of the presumption of death from absence, in 92 Am. Dec., 707.

It will be urged, no doubt, that whether Abram Elkin was dead or not, he had abandoned his life interest in this property, and that this gave to the persons entitled in remainder the right to enter. Without conceding that there is any such rule of law, or that it is applicable to the facts in this case, it is sufficient to say that the evidence tending to show that Elkin consented to the making of this will and acquiesced in its being carried into effect, so far as he was concerned, sufficiently estopped him from asserting any claim to the possession of the land as against a purchaser under the will.

A. S. Worthington,

A. A. Lipscomb,

*Attorneys for Plaintiff in Error.*

# APPENDIX.

RATHBONE *vs.* HAMILTON. } 4 App. Cas. D. C., 475–490.

Mr. Chief Justice ALVEY delivered the opinion of the court:

The first question is, from whom and how did Mrs. Lucy V. Elkin, under whom both parties to this action claim, really acquire the property, and what was the nature of the property as she held it? Did she acquire and hold it in her common-law right as a *feme covert*, or did she acquire and hold it as her separate statutory estate, as if she were not married, under section 727 of the Revised Statutes of the United States relating to the District of Columbia? This depends, of course, upon the terms of the statute, and the nature of the transaction as shown by the deeds.

The section of the statute just referred to is part of the revision of what is generally known as the Married Woman's act, of the 10th of April, 1869, 16 Stat., 45. The section as it stands in the revision is as follows:

"SEC. 627. In the District the right of any married woman to property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than *by gift or conveyance from her husband*, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband nor be liable for his debts."

Now, if the wife acquired the property in question by gift or conveyance from her husband, she did not hold the same as absolutely as if she were unmarried; but she held the same as her general property, as by the common law she was authorized to acquire and hold real estate, and not as her statutory separate estate. And assuming the facts to exist as they are stated in the record, there is no escape from the conclusion that the property was acquired by gift

or conveyance from the husband, though it was through the brother of the wife of the grantor as mere medium of transfer of title. There is no attempt to show that there was any real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character; and all the facts attending the transaction show beyond doubt that the real purpose and design of the husband was to transfer from himself to his wife the title to the property. The passing the title through a third party in no manner changed the effect of the transfer. Though the agency of a third party was employed, it was no less in legal effect and contemplation, a gift or conveyance from the husband to the wife. Indeed, if the exception in the statute could be avoided by adopting such a facile method of conveyance to the wife as that here employed, such exception would simply be rendered nugatory, and would have better been omitted from the statute. The deed, however, to the wife was completely effective, and vested in her the legal title to the property, but she held such property as her general estate, subject to her common-law disabilities as a *feme covert*. This has been expressly held, in reference to this very statute, and in a case like the present, where the title to the wife was conveyed by the husband through the medium of a third party (Kaiser *vs.* Stickney, b'k 26, L. C. Ed. Sup. Ct. Rep., 76; S. C., 131 U. S., 87 of Appendix of previously omitted cases). And so in the case of Cammack *vs.* Carpenter, 1 App. Cases D. C. (Wash. Law Rep., vol. 22, page 302). These cases, just referred to, arose since the Married Woman's act of 1869, and were decided in reference to the provisions of that act; and it was expressly held, that the property so acquired by the wife was held by her *as her general property*, which she could only convey by uniting with her husband in a deed executed in the form required by sections 450, 451 and 452 of the Revised Statutes relating to the District of Columbia. See, also, the case of Williams *vs.* Reid, 19 D. C., 46. It is clear, therefore, that Lucy V. Elkin did not acquire and hold the property in controversy under the statute as if she were unmarried.

2d. It is contended, however, that even though it be conceded that the wife took the property as her general estate, according to the common law, yet the statute clothed her with full power of disposal of the property, either by deed or will. And it is upon the terms of the next succeeding

section, 728, of the Revised Statutes of the District, that such contention is founded. That section is in these terms:

"Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried."

Both this and the preceding section, 727, have marginal references to the original act of 1869, ch. 23, sec. 1 (16 Stat., 45), as the source from which the text of the two sections, 727 and 728, was made. There is nothing to indicate, apart from some slight verbal changes or omissions of phraseology, that there was any design to change or extend the original provision of the act of 1869, ch. 23, sec. 1. At most, this change of phraseology could but give rise to a doubt as to the meaning of the statute.

Before this act of Congress of 1869, according to the principles of the common law in force in this District, a married woman had no power or capacity to convey the legal title of her real estate without the joinder of her husband; nor had she any power or capacity to devise her lands by will, being expressly excepted out of the statute of wills of Henry VIII. She was and is, however, competent to convey or devise by virtue of a power, and she may convey or devise her sole and separate estate in equity, except where restrained by the instrument creating the estate. Her land held by her as a *feme covert* at the common law was and is subject to the marital rights of the husband, and if he survives her, after the birth of a child, he is entitled to a life estate in the land by the courtesy.

Has this common-law principle, then, been so far radically changed by this act of Congress that the wife, though acquiring the property as at the common law, and not under the statute, may convey by deed or devise the property as if she were unmarried, and thus deprive the husband of all his marital rights? It is not seriously contended that this was the effect of the act of 1869, as originally enacted. But it is supposed that such is the effect of the change made in the phraseology of the revision.

As a rule of construction, it is laid down by the Supreme Court of the United States, that where the meaning of the Revised Statutes is plain, the court will not recur to the original statutes to see if errors were committed in the revision, but may do so to construe doubtful language em-

ployed. Cambria Iron Co. *vs.* Ashborn, 118 U. S., 54; United States *vs.* Lacher, 134 U. S., 624.

In the last case just referred to, that of U. S. *vs.* Lacher, the Chief Justice, in delivering the opinion of the court, said: "If there be any ambiguity in section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law. Citing United States *vs.* Bowen, 100 U. S., 508, 513; United States *vs.* Hirsh, 100 U. S., 33; Myer *vs.* Car Co., 102 U. S., 111. And it is said that this is especially so where the act authorizing the revision directs marginal references, as is the case here. 19 Stat., ch. 82, sec. 2, p. 268; Endlick on Int. Statutes, sec. 51. Accordingly we find that this section took the place of section 279 of the act of June 8, 1872."

By the first section of the original act of 1869, ch. 23, it was enacted that—

"The rights of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried."

In the revision this section of the original act has been broken or divided into two short sections, 727 and 728. And the change of phraseology that has occurred does not seem to be more than was necessary and appropriate in making the new arrangement of the subjects-matter of the original section. That, as we have seen, confined the wife's separate power of disposal to the *same property* that she was authorized to acquire under the statute as separate estate. And we think the wife's power of disposal has not been enlarged or extended by the revision beyond what was given her by the original statute; and that did not apply to or embrace property acquired by gift or conveyance from her husband. The wife's power of disposal over property con-

templated by the statute is given either by deed or will; but, as we have seen, it has been held expressly, in cases like the present, that the power of disposition by deed does not exist. Kaiser *vs.* Stickney, *supra;* Cammack *vs.* Carpenter, *supra.* And if the power could not be exercised by deed, for the same reason it could not be exercised by will.

3. But it has been contended for the appellee that, independently of the power given by the statute, the wife may dispose of her real estate that she holds to her sole and separate use, either by deed or will; and that the property in this case was held by the wife to her sole and separate use.

It is doubtless true that a married woman can, in equity, dispose by deed or will of the equitable fee-simple of her real estate, and of the absolute interest in her personal estate which belong to her for her sole and separate use; since in respect to such property, she is a *feme sole.* And, in respect to such property, it is immaterial that the legal estate is not vested in trustees, as the husband and all other persons on whom the legal estate may devolve will be deemed and treated as trustees for the persons to whom the wife has given the equitable interest. This is the established doctrine in the English chancery, and it is the established doctrine of the courts of this country, to the same extent. Taylor *vs.* Meads, 4 D. I. & S., 597; Pride *vs.* Bubb, L. R., 7 Ch., 64; Cooper *vs.* MacDonald, 7 Chan. D., 288; 2 Sto. Eq. Juris., sec. 1380. If the gift of conveyance be designed to be for the wife's separate and exclusive use, that intention will be fully acted upon and carried into effect. But the question is, whether the instrument of conveyance shows plainly that to have been the intention of the parties to it; for, as said by Judge Story, "the purpose must clearly appear beyond any reasonable doubt; otherwise the husband will retain his ordinary legal and marital rights in the property." Indeed, in all cases, the words must manifest an unequivocal intent to exclude the power and marital rights of the husband. 2 Sto. Eq. Juris., secs. 1381, 1382. But here, unfortunately for the defendant, there is nothing in the deed from Calvert to Mrs. Elkin to create a sole and separate estate in her, to the exclusion of the marital rights of the husband. The only clause in the deed which could possibly be supposed to have any such effect is the ordinary habendum clause, which declares that the property was to be held "unto the said party of the second part, *her heirs*

*and assigns*, to and for *her and their sole use, benefit and behoof forever.*" This is but a common formula found transcribed in all the several deeds in the record; the deed from Quinter to Abram Elkin, Jr., for the property in question, appearing to furnish the precedent for all the subsequent deeds for the same property. It clearly has no such effect as that of declaring a sole and separate estate in the wife. In the case already referred to, of Kaiser *vs.* Stickney, *supra*, the deed to the wife contained the same formal habendum clause as that of the present deed, but it was not contended, nor even suggested, that it was sufficient to create a separate and exclusive estate in the wife.

If, however, the deed contained an effective clause, creating a sole and separate estate, it could not avail the defendant in this action; for in an action of ejectment a legal estate or title is as necessary when title is relied on as a defense as is such an estate or title to the right of the plaintiff to recover. A mere equitable estate could not be set up to defeat the legal estate.

4. It has been contended by the plaintiff here, the present appellant, that even assuming that Mrs. Elkin had power to dispose of the property by will, the executor named in the will had no power of sale, and that the sale made by him, therefore, was simply void. But in this we do not agree. If the right to make the devise of the estate existed, the testatrix directed her property, real and personal, to be sold, and after deducting funeral and other expenses, she directed how the proceeds of the sale should be distributed and paid out. The making of this distribution was a proper duty of the executor; and it is clear, we think, that the executor named in the will would have power to sell and convey the real estate, as he would have of the personal estate, raised by necessary implication. This would seem to be the settled construction of similar devises or directions to sell, without express power conferred. Magruder *vs.* Peter, 11 Gill and John., 217; Peter *vs.* Beverly, 10 Pet., 532; Taylor *vs.* Benham, 5 How., 233.

Inasmuch as this case must be sent back to the court below for retrial, it is proper to advert to a question that must arise in the course of the trial, and that is, the question as to the right of entry of the plaintiff. That right depends upon the question, whether the husband of Mrs. Lucy V. Elkin is dead or alive. If alive, upon the assumption

that Mrs. Elkin was without power to devise the property, he would be entitled to his life estate by the courtesy, and until the termination of that estate, the plaintiff would have no right of entry in her character of heir-at-law of her mother and, consequently, no right to maintain an action of ejectment. To maintain the action the death of the father must be shown either by positive proof or presumption.

The judgment appealed from must be reversed and a new trial awarded.

*Judgment reversed, with costs to the appellant, and a new trial awarded.*

No. 6.

Sup. Ct. of Worthington & Lipscomb for P. E.

Filed Nov. 15, 1899.

# Supreme Court of the United States.

**OCTOBER TERM, 1899.**

*No. 6.*

FRANCES REBECCA HAMILTON, PLAINTIFF IN ERROR,

*vs.*

GRACE ABBIE B. RATHBONE.

**Supplemental Brief for Plaintiff in Error as to the Effect of the Revised Statutes on Previous Legislation.**

A. S. WORTHINGTON,
A. A. LIPSCOMB,
*Attorneys for Plaintiff in Error.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-14-'99

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## OCTOBER TERM, 1899.

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*vs.*

GRACE ABBIE B. RATHBONE.

## Supplemental Brief for Plaintiff in Error.

### STATEMENT OF THE CASE.

On June 13, 1891, the defendant in error brought an action of ejectment in the supreme court of the District of Columbia against the plaintiff in error to recover an undivided third interest of a parcel of land in the District of Columbia. The courts below having held as matter of law that none of several defenses relied upon by the plaintiff in error could avail her, a final judgment was entered against her and affirmed by the Court of Appeals of the District of Columbia.

In this court printed briefs were filed and the case was fully argued, and submitted on the 15th day of April, 1898.

On the 30th day of January, 1899, the court ordered a re-argument before a full bench, and particularly directed the attention of counsel "to the question of the effect of the Revised Statutes on previous legislation."

A full statement of the case and of all the questions raised on the record will be found on pages 1 to 6 of the original brief of the plaintiff in error. As to all those questions except the one to which the court directs special attention, we do not care to add anything to that brief. The excepted question arises in this way:

In July, 1867, the land in question was conveyed to Abram Elkin, who was the husband of Lucy V. Elkin (Record, p. 17). On the 29th of April, 1872, Abram Elkin and his wife conveyed this tract to her brother, Frederick G. Calvert (13, 14), and on the same day Calvert and his wife conveyed it to Lucy V. Elkin (12). The title remained in Mrs. Elkin until her death, which occurred on May 3, 1876 (15). She left a will by which she appointed Calvert her sole executor. She directed that all her property, real and personal, should be sold, and gave her husband $1,000 out of the proceeds of the sale, directing that the residue of the proceeds of sale, after the payment of funeral and other necessary expenses, should be divided equally between her four children (17). Calvert duly qualified as executor (11). In February, 1879, he sold the land in controversy to the plaintiff in error, and on the 20th of that month he, as executor, conveyed it to her by a deed which recited that the sale had been made under the powers conferred upon him by the will (8, 9). Before making the purchase the plaintiff in error had the title to the land examined by a lawyer (25).

To sustain her action the defendant in error claimed that Mrs. Elkin held this real estate as her general property, and that, being a married woman, under the laws of the District she could not devise it. This contention was supported by the trial justice under a decision of the Court of Appeals in

the same case after a previous trial and a verdict for the plaintiff in error.

The opinion of the Court of Appeals on the first appeal was delivered by Mr. Chief Justice Alvey, and a copy of it is appended to our original brief. It will be found also in the report of the case in 4 App. Cas. D. C., 475. The case was made to turn upon the construction of section 728 of the Revised Statutes of the District of Columbia. The original statute from which that section is derived was an act of Congress approved April 10, 1869, entitled "An act regulating the rights of property of married women in the District of Columbia" (16 Stat., 45), of which the following is a copy:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *femme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise, and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 2. *And be it further enacted*, That any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

In the revision of the District laws in 1874 this act became sections 727 to 730, as follows:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be sub-

ject to the disposal of her husband, nor be liable for his debts.

"SEC. 728. Any married woman may convey, devise and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"SEC. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

The last section of the Revised Statutes of the District, section 1296, provides that all prior acts of Congress relating to the District, "any portion of which is embraced in the foregoing revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

## ASSIGNMENTS OF ERROR.

The assignments of error contained on page 7 of our original brief are all still relied upon. The one with which we are now particularly concerned is the first one, which is as follows:

"The court below erred in holding that the will of Lucy V. Elkin was void as to the real estate in controversy."

## ARGUMENT.

The simple question here presented is whether when a statute gives to a married woman the unqualified right to "convey, devise, and bequeath her property in the same manner and with like effect as if she were unmarried," the language is so ambiguous that it may be explained and

controlled by a prior repealed statute confining the right to property acquired otherwise than by voluntary gift or conveyance from the husband.

The Revised Statutes were intended to embrace all acts of Congress general and permanent in their nature, in force on the first day of December, 1873, "as revised and consolidated" by commissioners appointed for the purpose. The object of the revision was to have all the existing statutes brought into a single volume, so that any one wishing to find what is the written law upon any particular subject might not have to grope through the eighteen volumes of the Statutes at Large, but might find the whole of that law in a single volume, and in that volume would find grouped together the different acts of Congress relating to the same question.

This reason applied with peculiar force to statutes relating solely to the District of Columbia, for the comparatively few special acts of Congress relating to the District were covered up in a multitude of statutes applicable to the whole country. To still further remedy the inconvenience arising from this cause the statutes relating only to the District were compiled in a separate volume, known as the "Revised Statutes of the District of Columbia."

But if one who examines that volume cannot rely upon it when the language used in it is reasonably plain, the object of the revision is destroyed, and our last state will be worse than our first, for Congress in that event will have but added another statute to the mass of earlier laws, and no one will be safe without examining them all.

No stronger illustration of this can be found than the present case.

A laboring woman out of her small savings contracts to buy a lot whereon to build a home. She goes to a lawyer to have the title examined. He finds that the vendor gets title under the will of a married woman. He looks at the statute and finds that a married woman may devise her

property just as she could if she were unmarried. He passes the title, his client pays her money and takes a deed, and years afterwards it is sought by an action of ejectment to turn her out of possession because a certain old and repealed statute contained an exception as to property coming to a married woman from her husband.

If such a claim can be maintained, who will dare to rely upon the Revised Statutes in any case without going back to the original acts of Congress? And in that case of what use is the revision?

Clearly the real question is whether in the mind of one having no knowledge of the earlier statute section 728 is ambiguous; and looked at in that way it is hard to see anything ambiguous about it.

Both in its legal and in its common acceptation, the word *property* is broad enough to include everything that one person can own and transfer to another (19 Am. and Eng. Enc., 283–285; Black's Law Dict. and Anderson's Dict. of Law—word Property).

The deed from Calvert to Mrs. Elkin conveys the land described in it to her in fee-simple. It is conveyed to her "and her heirs and assigns forever." It is to be held unto her, "her heirs and assigns, to her and their sole use, benefit, and behoof forever" (9). This certainly made the land conveyed "her property."

Much light is thrown upon this question by an act of Congress approved June 1, 1896 (29 Stat., 193), entitled "An act to amend the laws of the District of Columbia as to married women, to make parents the natural guardians of their minor children, and for other purposes." The sections of that act which are pertinent here are as follows:

"That the property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and real, personal, or mixed property which shall come to her by descent, devise, purchase, or bequest, or the gift of

*any person*, shall be and remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts, except that such property as shall come to her by gift of her husband shall be subject to, and be liable for, the debts of the husband existing at the time of the gift.

"SEC. 2. That a married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property, and she may, by a promise in writing, expressly make her separate estate liable for necessaries purchased by her or furnished at her request for the family.

* * * * * * *

"SEC. 11. That sections seven hundred and twenty-seven, seven hundred and twenty-nine, and seven hundred and thirty of the Revised Statutes of the United States for the District of Columbia, be and the same are hereby, repealed."

The first section of the above act changes the law by making a married woman's property her separate estate, whether it comes from her husband or not. The second section authorizes a married woman to "bargain, sell, and convey" her property, omitting the words "devise and bequeath" in the earlier act. By section 11 of the later act only sections 727, 729, and 730 of the Revised Statutes of the District are repealed, leaving section 728 in full force and effect. The supposed ambiguity growing out of the contiguity of section 728 with section 727 no longer exists, because section 727 is wiped out altogether. Obviously therefore Congress understood section 728 to give to a married woman the power to devise and bequeath her property without limitation, and for that reason allowed it to stand. But if that section has the restricted meaning which was given to it by the Court of Appeals in this case the legislature has failed in its obvious intent. By virtue of the later act a married woman while living would have the

same rights as an unmarried woman in her real estate, from whatever source derived, including the right to convey it by deed, but she could not dispose of it by will if it came from her husband.

Of course we know that it is not in the power of Congress by a later statute to construe an earlier one so as to affect rights that have accrued in the meantime; but the fact that those who prepared, evidently with great care, this important act of 1896, understood section 728 to give to a married woman the absolute right of disposing by will of all her property, and so did not modify it, is very persuasive as to the natural import of the words used in that section.

There was a good reason for the change in the wording of section 728, over and above the general tendency to the emancipation of married women from the restraints as to their property rights imposed by the common law. We have shown on pages 26 to 31 of our original brief in this case that the Maryland act of 1798 on its face seemed to give to married women the right to devise their real estate. It had, no doubt, been otherwise construed in some entra-judicial opinions. The language of the original act of 1869 gave color to this construction, and might seem to take away the right when property came to the wife from her husband. It was natural that this step backward should be corrected.

But whether the reason was good or bad, the change was made, and, like hundreds of other changes in the revision, must be given its full effect.

"The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere fail-

ure to provide for contingencies which it may seem wise to have specially provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Holy Trinity Church vs. United States*, 143 U. S., 457). It involves no injustice, oppression, or absurdity (*United States vs. Kirby*, 7 Wall., 482; *McKee vs. United States*, 164 U. S., 287). There is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other."

U. S. *vs.* Goldenburg, 168 U. S., 102, 103.

"It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts rather than an intention to give it, and a mistaken opinion of the legislature concerning the law does not make law; but if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

Postmaster General *vs.* Early, 12 Wh., 148.

"Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government, even though it may be the settled practice of the department."

St. Paul, etc., Railway Co. *vs.* Phelps, 137 U. S., 528–536.

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

Lake County *vs.* Rollins, 130 U. S., 662–670.

"Where the legislature makes a plain provision *without making any exception*, the courts can make none."

Lessee of French *vs.* Spencer, 21 How., 238.

Yturbide's Executor *vs.* U. S., 22 How., 290, 293.

"By omitting retired officers from the class entitled to longevity pay, Congress expressed its purpose not to allow them longevity pay. No other construction can be put upon the law without importing into it words which Congress has left out. * * * To give the statute this meaning would be legislation and not interpretation."

Thornley *vs.* U. S., 113 U. S., 310–315.

This court has frequently applied the rule established by the foregoing cases in the construction of the Revised Statutes.

A case strikingly illustrating the position for which we are now contending is United States *vs.* Bowen, 100 U. S., 508–513. As the law stood prior to the revision, all pensioners were required to give them up on entering the Soldiers' Home at Washington; but in the revision, by the interpolation of the words "all such," the law was changed so as to provide that only those pensioners who had not contributed to the home should be required to surrender their pensions on entering it. It was held in that case that the language under consideration as it stood in the revision was plain, and that the original act therefore could not be referred to in construing it; and the court adds that there was a good reason for the change, since those who had by deductions from their pay or otherwise contributed to the building of the home were entitled to go there when old and disabled without being required to give up their pensions.

In that case a general provision in the original act had been limited in its operation in the revision to a certain class by the insertion of the word "such." In this case a particular provision has been made general by omitting the words "the same." The language of the revision involved here is certainly as plain as that which was under consideration in United States *vs.* Bowen, and the reason for the change in this case is as obvious as it was in that.

United States *vs.* Bowen was approved and followed in

Cambria Iron Company *vs.* Ashburn, 118 U. S., 54–57. In that case the court had under consideration section 639 of the Revised Statutes, which was taken from but changed the act of March 2, 1867 (14 Stat., 558). Mr. Chief Justice Waite, in delivering the opinion of the court in that case, said:

"There is nothing of doubtful meaning in this section. It is divided into three subdivisions, all relating to the removal of suits, but each providing for a separate class. * * * *Each subdivision is complete in itself and in no way depends upon any other.* Each describes the particular class of suits to which it relates and without reference to the others."

So here section 728 is complete in itself. It does not refer to section 727, and in no way depends upon it. There is nothing in the two sections to suggest that Congress did not intend, during the joint lives of the husband and wife and until she conveyed it to somebody else, to preserve the husband's common-law rights in real estate which she had received from him, but to terminate those rights when she conveyed or devised it. The omission in section 728 of the words found in section 727—"acquired * * * in any other way than by gift or conveyance from her husband"—necessarily implies that the limitation on the wife's power which they import was not to apply in cases arising under section 728.

In Deffeback *vs.* Hawke, 115 U. S., 392–402, this court said:

"No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised Statutes when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision."

Finally, in the important case of Bate Refrigerating Company *vs.* Sulzberger, 157 U. S., 1–39, this court, in referring

to the argument pressed upon it in that case that the revision should be held to mean what the prior law meant, "unless a purpose to change and alter is manifested by clear, unambiguous language," said:

"The circumstances under which the courts may look at prior laws for which a revision has been substituted are stated in United States *vs.* Bowen, 100 U. S., 508–513. * * * For the reasons already stated, the principle announced in the cases just cited cannot avail the plaintiff if the existing statute is interpreted to mean what its words import according to their natural signification."

Again in the same case, at page 45, the court, in enforcing its conclusion that changes in the original law are presumed not to be mistakes, says:

"This presumption is strengthened by an examination of the act approved February 18, 1875 (18 Stat., 316). * * * That act upon its face shows that the entire revision of 1874 after it took effect was carefully re-examined for the purpose of ascertaining whether there were errors or omissions in the work of revision. Now, it is inconceivable that the difference * * * could have escaped the attention of Congress. * * * The act of 1875, for the purpose of correcting errors and omissions, amended or repealed nearly seventy sections of the Revised Statutes. Still further, as an examination of the statutes will show, since the Revised Statutes went into operation nearly eight hundred sections other than those referred to in the act of 1875 have been amended or repealed; but no amendment has ever been made of section 4887."

This argument applies with equal force to the Revised Statutes relating to the District of Columbia. An examination of Richardson's Supplement to the Revised Statutes 1874–1891, pages XVII, XVIII, will show that prior to November, 1891, about one hundred amendments had been made in that portion of the Revised Statutes which relates to the District. These changes involved more than 200 of the 1,296 sections in that revision; yet not only has section 728

not been amended, but, as we have seen, it has recently been reaffirmed by repealing the other sections taken from the married women's act of 1869 and allowing it to stand—allowing it to stand in such a way as to show that it was understood to give to a married woman the right to dispose by will of all her property, however acquired.

In Chief Justice Alvey's opinion in this case some stress is laid upon the language used by the Chief Justice of this court in the case of United States *vs.* Lacher, 134 U. S., 624, in which, after citing several of the cases in this court in which it has been held that where there is any ambiguity in the Revised Statutes the original statutes may be referred to to ascertain what, if any, change of phraseology there is and whether such change should be construed as changing the law, it is added that " this is especially so where the act authorizing the revision directs marginal references, as is the case here (19 St., ch. 82, sec. 2, p. 268; Endlich on Int. Stats., sec. 51)."

The act of Congress in the 19th Statutes at Large here referred to was enacted March 2, 1877 (19 Stat., 268). It provides for a new edition of the first volume of the Revised Statutes.

That act was amended March 9, 1878, by changing section 4 so that the printed volume which the act provided for should be only legal and not conclusive evidence of the laws therein contained, and by adding to section 4 a clause providing that the volume containing the second edition of the Revised Statutes " shall not preclude a reference, to nor control in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three " (20 Stat., 27).

The will involved in this case was made April 22, 1876 (10), and took effect on the death of the testatrix, prior to the 8th day of June, 1876, when her executor took out his letters (11). It is manifest, therefore, that an act of Congress

passed in 1877 could not affect the validity of this instrument.

There has never been a second edition of the Revised Statutes relating to the District of Columbia. The preparation and publication of that volume were authorized by the acts of June 27, 1866 (14 Stat., 74), providing for the general revision of the statutes, and by the act of June 20, 1874 (18 Stat., 113). The act of June 27, 1866, provides that the commissioners "shall arrange the same * * * with side notes so drawn as to point to the contents of the context, and with references to the original text from which each section is compiled, and to the decisions of the Federal courts explaining or expounding the same, and also to such decisions of the State courts as they may deem expedient." The same act further provides by section 3 that when the commissioners have completed the revision they shall submit a copy thereof in print to Congress, in order "*that the statutes so revised and consolidated may be re-enacted if Congress shall so determine; and at the same time they shall also suggest to Congress such contradictions, omissions and imperfections as may appear in the original text, with the mode in which they have reconciled, supplied and amended the same*"

Section 2 of the act of June 20, 1874 (18 Stat., 113), charges the Secretary of State with the duty of causing the revision to be prepared for printing and publication, and authorizes him to complete the references to the decisions of the courts of the United States "and such decisions of State courts as he may deem expedient."

The same section makes the proposed publication legal evidence of the laws and treaties therein contained. There is as to the original revision, neither in this act nor any subsequent statute, any such provision as the above-quoted one in section 4 of the act of March 2, 1877, relating to the second edition of the Revised Statutes. It, is, therefore, quite apparent that, while Congress intended that as to the second edition any discrepancies between it and acts of Congress

passed after December 1, 1873—the date of the original revision—should be settled by reference to the original act, yet as to the original revision it was to stand, regardless of such discrepancies.

It was pursuant to section 3 of this same act of June 20, 1874, that the Revised Statutes were divided into volumes, the first containing the Revised Statutes of the United States and the second the Revised Statutes relating to the District of Columbia, post-roads, and public treaties.

It would seem from this that the commissioners who prepared the Revised Statutes relating to the District of Columbia were authorized to *amend* the statutes, and were required to submit their work to Congress to be enacted into a law if Congress should be satisfied with the work; and since Congress did enact the work of the commissioners under the name of the Revised Statutes, that revision becomes a new law, governed by the same rules of construction that apply to any amendatory legislation.

As to marginal references, it will be seen that first the compilers and afterwards the Secretary of State were authorized to make these references include not only the original statutes from which the particular section was taken, but all decisions of the Federal courts bearing upon the section and selected references to the State decisions. It is respectfully submitted that it is not to be supposed that Congress intended to make decisions of the Federal courts and of the State courts, necessarily conflicting in many cases, a part of the revision, and that the insertion of references to original statutes and to judicial decisions, State and Federal, was for the purpose of convenience, and not with the view of affecting the construction of the section opposite which they were noted.

In the opinion of the Court of Appeals in this case rendered on the first appeal reference is made to the case of Kaiser *vs.* Stickney, 131 U. S., Appendix CLXXXVII, as sustaining the conclusion reached by that court against the

validity of Mrs. Elkin's will. There is no statement of the facts in that case accompanying the opinion in 131 U. S. The case, as decided in the supreme court of the District of Columbia, is reported in 3 MacArthur, 118. It there appears that the instrument, the validity of which was in question, was a deed which was executed and delivered in September, 1867, before the passage of the married women's act of the District. Neither in the report of the case in 3 MacArthur nor in the report of the case in 131 U. S. is any statement made as to the briefs of counsel, nor even as to the points upon which the respective counsel relied; but upon examination of the briefs on file in this court we find that when the case was argued here on behalf of the wife, her counsel, Michael L. Woods and Belva A. Lockwood, themselves contended that the wife did not take under the deed to her either an equitable or a statutory separate estate. Their whole argument was based upon the proposition that the land involved in the case was a part of the wife's general property. The opposing counsel, Mr. Enoch Totten, in his brief did not controvert this view of the matter. Consequently the decision of this court was put upon a state of facts admitted to exist by the counsel in that case. The whole question was disposed of by Mr. Chief Justice Waite in a single sentence. We submit that, even if the facts in that case were like the facts in the case at bar, the rights of other parties could not be affected by the concession of counsel in that case that Mrs. Kaiser did not have a separate estate. Besides, in that case the question was whether a deed was valid which had been jointly executed and acknowledged by the husband and the wife, the wife's acknowledgment being taken privily and apart from her husband, as required by the statutes of the District of Columbia governing that subject. Such a conveyance was unquestionably good, whether the property was a part of the wife's general property, an equitable separate estate, or a statutory separate estate. The only ques-

tion really involved in the case was whether the wife was bound by a mortgage which was given to secure her husband's debt, and the mortgage which was in question was made in April, 1871 (3 MacArthur, 118), three years before the enactment of the Revised Statutes, and consequently before the wife had been given power generally to convey, bequeath, and devise "her property."

It is quite clear, therefore, that the Court of Appeals erred in relying upon Kaiser *vs.* Stickney as sustaining the contention that section 728 applies only to a married woman's separate estate.

If our view as to the proper construction of section 728 should prevail, it is not necessary to consider any other question in this case. If it should not, then it will be necessary to dispose of the remaining questions raised on the record and discussed in our original brief.

We remind the court, however, that our contention is that the will in question is valid, even under the act of 1869 as it stood before the revision. The several grounds upon which we make this claim are fully set forth on pages 7 to 37 of our main brief in the case.

A. S. WORTHINGTON,
A. A. LIPSCOMB,
*Attorneys for Plaintiff in Error.*

No. 206.

Brief of Colbert for D. C.

# BRIEF OF DEFENDANT.

Filed Apr. 14, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

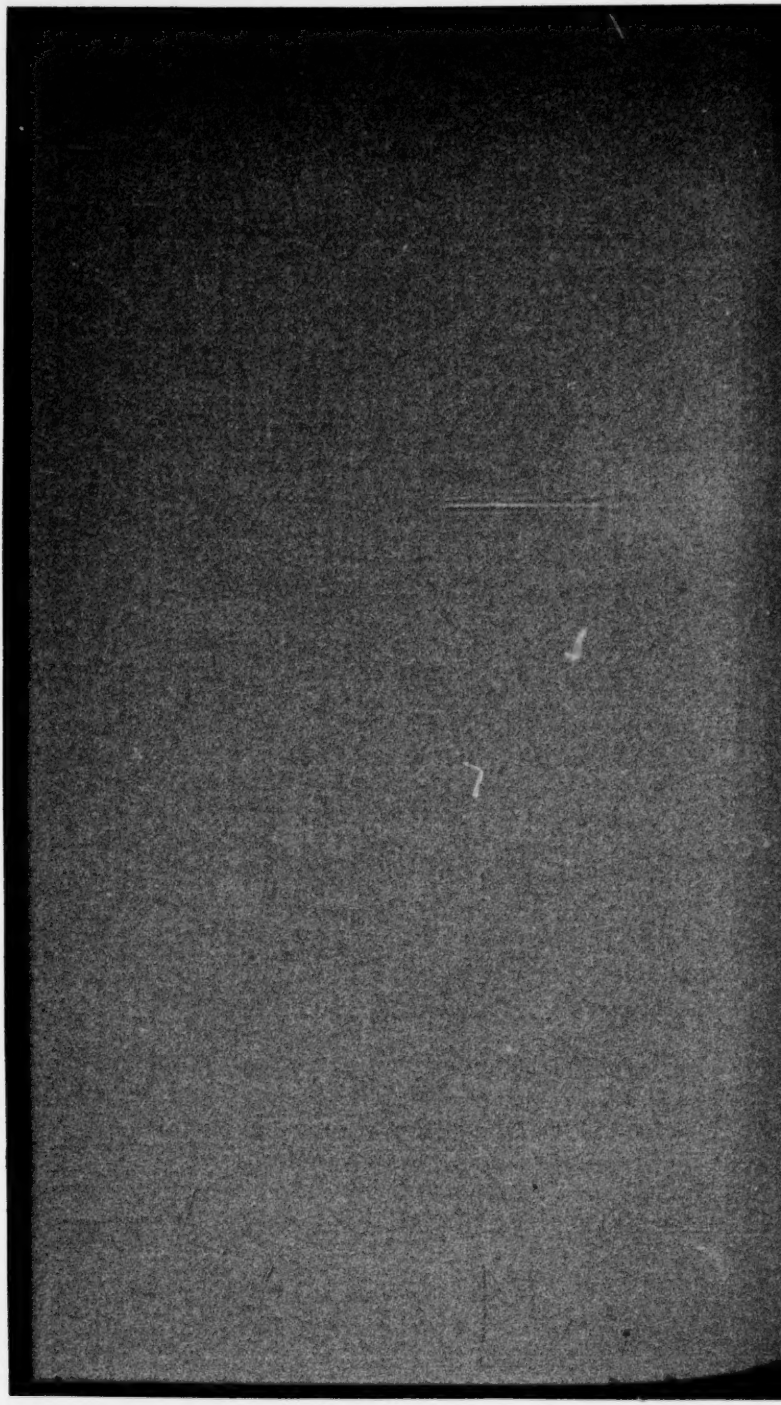
No. 206.

FRANCES REBECCA HAMILTON,
Plaintiff in Error,
vs.
GRACE ABBIE B. RATHBONE.

In Error to the Court of Appeals of the District of Columbia.

FILED JULY 27, 1896.

(16,345.)



# Supreme Court of the United States.

OCTOBER TERM, 1897.

FRANCES REBECCA HAMILTON,
*Plaintiff in Error,*
*vs.*
GRACE A. B. RATHBONE,
*Defendant in Error.*
No. 206.

## BRIEF OF DEFENDANT IN ERROR.

### Statement of Case.

As argument for the defendant in error, we beg leave to refer the court to the very full and clear statements of the case shown in the appended opinions of Chief-Justice Alvey on the first appeal and of Mr. Justice McComas on the trial in the Special Term at the jury trial, appearing at pages 1*a* and 11*a* respectively of this brief. We will also state the natural order of the defendants proof at the jury trial, as shown in the record in a somewhat disconnected order.

1. The declaration filed June 13th, 1891. (Rec. p. 1.)

2. "The plaintiff offered in evidence a patent from the State of Maryland, conveying the ground in dispute to Anthony Holmead, and proved by record evidence, the regular descent of the title from Anthony Holmead to Ada Quintar, formerly Ada Holmead, the grantor of Abram Elkin," the father of Deft. in error. (Rec. p. 25.)

3. Ada Quintar *et vir* to Abram Elkin, on July 31st, 1867. (Rec. p. 17.)

4. Abram Elkin *et ux* to Fred. G. Calvert, on April 29th, 1872. (Rec. p. 13.)

5. Fred. G. Calvert *et ux* to Lucy V. Elkin, (mother of defendant) on April 29th, 1872. (Rec., p. 12.)

6. Marriage of defendant's parents, on April 15th, 1863. (Rec., p. 16.)

7. Death of Lucy V. Elkin, defendant's mother, on May 3d, 1876; leaving husband and 4 children. (Rec., p. 15.)

8. Death of one child at the age of 9 or 10 years, on February 2d, 1885. (Rec., p. 15.)

9. Grace A. B. Rathbone's birth, March 11th, 1864. (Rec., p. 15.)

10. Disappearance and continued absence of defendant's father, Abram Elkin, for 15 years before suit brought. (Rec., pp. 15, 16, 19, 20, 23, 23.)

11. Possession and adverse claim of plaintiff in error, defendant below. (Rec., pp. 7, 8, 16, 24, 25.)

12. Defendant also put in certain Orphans Court Records of certain proceedings, and the record of the deed from Fred. G. Calvert, Exr., to plaintiff in error, all limited to and for the sole purpose of showing that both parties *claimed* title to the land in dispute through the same common source, to wit: Lucy V. Elkin: Finally, fearing the record of proceedings in the Orphan's Court might not be legal evidence in the case for any purpose, title was proved from the State, etc., as above stated.

II.

**As to the Proof of Death.**

In this case the proof shows that Elkin, a month or two after his wife's death, to wit, in 1876, disappeared from his home in this city and from that date down to the time of the last trial in 1895 no member of his family and no other person has ever seen or heard from him. Elkin had no brother and no sister. It does appear however that he had a father living in Philadelphia and a mother who was estranged from her husband and not living with him. He had no other relatives on earth except his children, one of whom was a cripple.

Upon the question of Elkin's disappearance the following witnesses testify:

1. Grace A. B. Rathbone, the plaintiff, who says that she saw and talked to her father for the last time in 1876, and that thereafter she never heard from him: that she has inquired to ascertain his whereabouts and wrote to his father, who replied that he knew nothing of him: that her lawyers had hunted for him without avail. (Rec. p. 15).

Kate Ellis, who was raised with Mrs. Elkin in Charles Calvert's family; that she saw Elkin at his wife's funeral and saw him again, June 17, 1876; that he frequently visited her house; that after June 17, 1876, she never saw nor heard from him; that she inquired as to his whereabouts, but no member of his family ever heard from him; that she wrote to his father, who referred her to the Calverts, stating that Abram Elkin had not been in Philadelphia for thirty years and that he wasn't worth looking after. (Rec. p 16.)

Mrs. Hamilton testifies that since 1879 she never saw

Elkin and that he never asserted any claim of title to the property. (Rec. p. 16.)

FRED G. CALVERT testifies that Elkin stated he wanted to get out of town; that shortly after Mrs. Elkin's death Elkin left a note with Calvert stating, "Good-by, Fred I am going to leave town and not come back"; Calvert never saw him again, although he tried to find him; that he wrote to Elkin, Sr., without avail; that he wrote to the postmaster at Chicago without success. (Rec. pp. 19, 20.)

MARY J. LOWERY testified that after Mrs. Elkin's death, Elkin came to the Calvert house and wanted to stop there, but he was informed he would have to go elsewhere; Elkin's children were then living with the Calvert's; he stated that he was going to leave the city, he did not say where he was going, and Mrs. Lowery never saw him again; she also wrote to Philadelphia to Elkin, Sr., but the latter replied that he had heard that Elkin had married and gone to England. (Rec. pp. 22, 23.)

WILLIAM HOLMEAD testified that in 1876 Elkin stated that he was going to leave his children with the Calverts and was going to leave the city. (Rec. p. 23.)

In addition to this proof it appears that inquiry was made of Solomon Elkin, the father, for the purpose of ascertaining the son's whereabouts, and the father knew nothing of him, except that many years ago he heard that he had married again and left this country. (Rec., pp. 16, 22, 23.)

So that we have the testimony of six people, Elkin's children, his friend, connections and acquaintances, all testifying that he disappeared in 1876 and for nearly *twenty* years has never been seen or heard from by anybody; that his place of residence was in the District of

Columbia; that he left his home; that he never, so far as any one knows or testifies, acquired any new residence, but that he simply left the City of Washington, nearly twenty years ago, and that is all anybody knows of his whereabouts or his existence.

Upon this uncontradicted proof, we respectfully submit that in this case, the law says that his death is presumed, and that that presumption, in the absence of any shred of evidence to overcome it, is controlling, and that the court below was correct in so holding.

This being the established law what is the rule as to the presumption of death and what is the duty of the court in the light of the authorities just cited in acting upon that presumption when there is no proof against it?

The statute 19, Charles II., Chapter 6, section 2, which is the foundation of all the decisions of the courts as to presumptions will be found at page 450 of Abert's Compilation, and provides that if any person for whose life such estates shall be granted remains beyond the seas and absents himself in this realm for the space of seven years together and no sufficient proof be made of the life of such persons, in any action announced by the lessors or reversioners, the person shall be accounted as naturally dead, and the judge "*shall* direct the jury to give their verdict as if the person so remaining beyond the seas or otherwise absenting himself were *dead*."

And in Alexander's British Statutes, 499, it will be seen that the preamble to the statute recites "whereas divers lords of manors and others have used to grant estates by copy of court roll for one, two or more lives, according to the custom of their several manors * * * and it hath often happened that such person or persons for whose life or lives such estates have been granted have gone beyond the seas, or so absented themselves for many years, that the lessors or reversioners cannot find out

whether such person or persons be alive or dead by reason whereof lessors and reversioners have been held out of possession of their tenements for many years after all the lives upon which such estates depend are dead in regard that the lessors and reversioners when they have brought actions for the recovery of their tenements, have been put upon it, to prove the death of their tenants, when it is almost impossible for them to discover the same. For remedy of which mischief be it enacted, &c."

Indeed there seems to be no question about the rule, and that is that if a person absent himself from his residence for seven years without having been heard from by those who would naturally have heard from him he will be presumed to be dead.

Lawson on Presumptive Evidence, 200, states: the rule to be that an absentee shown not to have been heard of for seven years by persons, who if, he had been alive would naturally have heard of him is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term and the author cites numerous cases to support the text.

The Supreme Court of the United States lays down the same rule.

Davi *vs.* Briggs, 97 U. S., 628.

And indeed this is the rule laid down by all the courts and text writers.

Taylor on Evidence, Sec. 157.
Stephen on Evidence, ch. 14, art. 99.
1 Greenleaf on Evidence, Sec. 41.
See also Baden *vs.* McKinney, 18 D. C., 268.
1 Am. and Eng. Enc. of Law, 39 and cases there referred to.

Applying these principles to the facts contained in this record, it will be seen that Elkin, who had his domicile

and residence in the District of Columbia, left here in 1876, and has never since been heard from by anybody, except that two or three years later his father *heard* that he had gone to England and Calvert heard he was in Chicago, but upon inquiry, there it was found that this information was incorrect. Certainly since 1880 no one who testified at the trial or who was applied to for information by any of the witnesses ever saw or heard from Elkin, so that during the ten or eleven years next before the beginning of this action there is absolutely no evidence explaining his continued absence. Thus we bring this case beyond any shadow of doubt within the first branch of the rule.

Nowhere does it appear that Elkin ever acquired a new residence elsewhere, or had any intention of locating elsewhere when he left this city. Now, then, who are the persons who would naturally have heard from him. Calvert had in his possession nearly $1,000, to which Elkin was entitled and certainly it is natural to suppose that Elkin would if living communicate with the man who was the custodian of his money. But Calvert never heard from him, although he is diligent in trying to ascertain his whereabouts.

Elkin's father knows nothing of him and hears nothing from him. His own children, one of them, a helpless cripple never hear from him, although they and their lawyers have tried to find him. His friends and acquaintances and associates inquire for him and yet no one can ascertain whether he be living or dead.

Within the rule laid down by all the decisions is there *a presumption* that he is dead? We submit that the proposition is to plain for discussion and the presumption of death, after seven years' absence, is strengthened by the fact that instead of being absent for seven years he has been absent for twenty years.

This being the presumption what is its effect? It may be true that the presumption is only *prima facie*, but the presumption must prevail in the absence of any evidence to the contrary.

"The law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode *the law* defines the nature and amount of the evidence which it deems sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party, and if no opposing evidence is offered the jury are bound to find in favor of the presumption. A contrary verdict would be liable to be set aside as against the evidence."

1 Greenleaf on Evidence, see 33.

In U. S. *vs.* Wiggins, 14 Peters, 347, the court says: "What is *prima facie* evidence of a fact? It is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose."

We confidently submit that upon this point of the case there was no error in the ruling of the trial justice.

III.

**Tenancy of Elkin Destroyed.**

We further urge and submit that under the undisputed evidence in this case the defendant in error need not rely alone on the death of her father to show her right of entry. It is established by the evidence of the other side that he did vacate the property, and that he publicly announced that he was going to leave the city and not return. He made no provision for the payment of the taxes, nor for the care or control of the property; he utterly abandoned and deserted it for more than fifteen years before suit brought. He was not compelled to

occupy as tenant by the curtsy; it was optional with him to surrender his right, and he both verbally and in writing declared that he was going to leave finally, and did leave; that ended his tenancy.

Moore *v.* Allen, 3d Conn., 483.
McKenney *v.* Reeder, 7th Watts, 123.

Again: By the evidence of the other side, it also appears that the father intended and expected the property to be sold, but took no steps, made no effort, used no means to prevent it; on the contrary, he in effect encouraged it, assumed that it would be done, treated with the assumed executor for prepayment of part of the purchase money, and actually received "something over $200" (Rec. p. 19); and on deserting the house left a note in his own handwriting saying: "Good-bye Fred, I am going to leave and *not come back.*" Thus inviting, aiding and abetting the sale, and affording the purchaser full and free opportunity to gain possession under a colorable title, and set up an adverse claim of title in fee against all the world, which was afterwards done by Mrs. Hamilton, and her adverse possession has been maturing for over eighteen years.

Now, we confidently submit that it was the legal duty of this tenant by the courtesy to *prevent* the very thing he thus helped to bring about; and that, in legal effect, her adverse claim of title is his adverse claim of title, by which he repudiates and destroys his tenancy, which gives the heir a clear right to maintain ejectment.

4th Kent., Com. 34 and 77.
Walden *v.* Bodley, 14th Pet., 156.
Zeller *v.* Eckhardt, 4th How., 289.
White *v.* Wagner, 4th H. & J., 373.
McKenney *v.* Reeder, 7th Watts., 123.
Sacket *v.* Sacket, 8th Pick.

IV.

As relating to the right of entry in the defendant in error, and with some hesitation, it is also submitted that it was not absolutely incumbent on her part to prove the death of her father in order to make out a good valid *prima facia* case.

Having proved a legal title in her mother, the possession of her father and mother and the death of her mother, and her own legal heirship to a third interest, that established her own legal title in fee, which carried with it a legal right of possession. See Classon *vs.* Baldwin, 37 N. Y. State Reporter, 213; that in connection with the other admitted fact, that the plaintiff in error had been in undisputed adverse possession for more than 11 years, raising a strong presumtion that the right of possession in the life tenant had, in some way, been extinguished; put it upon her, if she would defend through an outstanding right of possession in Elkin, to prove it affirmatively, at least by proving his existence when the suit was brought.

Had an outstanding legal title in fee been set up in defence, under well known practice it would have been necessary to prove it, and that it was a subsisting title.

There may be some vice in this reasoning not now observed, and so it is submitted for what it may be worth; believing that it is founded on legal principles so plain and familiar as not to need the citation of authorities.

V.

**As to Estoppel in pais.**

The evidence shows that during her minority the plaintiffs was supplied with same articles of clothing by Calvert, the executor of her mother's estate, but she never received any money from him.

Calvert testified that he bought clothing for the plaintff, and gave her money to pay her board, but that he did not know whether he had any of the proceeds of the sale remaining in his possession after 1881, and that he did not know whether or not he gave her anything after 1881.

Mrs. Calvert testified that the money derived by her husband from the sale to Mrs. Hamilton was exhausted before the plaintiff became of age. Mrs. Hamilton testified that in September, 1885, after the plaintiff attained majority, she (the plaintiff) called upon her and said that she didn't see what right Calvert had to sell the property that belonged to her father or her mother.

The plaintiff herself testified that she did not remember receiving anything from Calvert after she became of age; that she first learned that Calvert had no power to sell the property in 1891 when she was first informed by her attorney; that Calvert never informed her out of what fund he was purchasing the clothing which he gave her, and that after learning her rights in her mother's property she never received anything from Calvert; that she did receive a pair of shoes from Calvert, but she does not know whether she was then of age or not; that at the first trial she testified that she was probably over 21 years of age.

In the case of Dickerson *vs.* Colgrove, 100 U. S., 579, an action of ejectment, the court says: "The estoppel here relied upon is known as an equitable estoppel, or estopel *in pais*. The law upon this subject is well settled. The vital principle is that he, who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both." And in that case the defendant was misled by the con-

duct of the plaintiff upon which reliance was had.

To the same effect in the case of Kirk *vs.* Hamilton, 102 U. S., 68.

In the case of Craig *vs.* VanBibber, 18 Am. St. Rep., 674, it is said that if the infant receive a consideration from the other contracting party "but has spent, wasted, or disposed of it during his minority, so that it no longer remains in his possession, the reason which requires him to disaffirm the contract within a reasonable time after coming of age, in order to avoid being bound does not exist."

In the present case it is not pretended that the plaintiff received anything from the defendant or that the plaintiff did or said anything upon which the defendant acted to her detriment. On the contrary the proof shows that on the only occasion upon which she ever saw the defendant, Mrs. Rathbone, repudiated Calvert's right to sell the property in dispute.

The inquiry here is—Did the plaintiff after her majority, with full knowledge of all the facts and of all her rights thereunder, knowingly elect to take the proceeds of the sale instead of the land itself and thereby estop herself from maintaining this suit?

Upon this inquiry the burden is upon the defendant to show that the plaintiff ratified this unlawful sale after attaining her majority by electing to take from Calvert the proceeds of the sale in his hands, and the answer to such a contention in the first place is that there is no such proof in the record.

Mr. Calvert says he does not know that he had any money left after 1881, the plaintiff having reached her majority in 1885, and Mrs. Calvert testified that the money was all exhausted before the plaintiff became of age. The plaintiff herself testified that she did not remember receiving anything whatever from Calvert after

she was of age. But she does say that at the last trial she said Calvert may have given her a pair of shoes after her majority. We would suggest in the language of the Supreme Court of the United States, even assuming that the mere gift of a pair of shoes by Calvert to his own niece, without specifying from what funds he made the purchase, or that it was not a gratuity amounted to an estoppel, *de minimis non curat lex.*

Winconsin Central R. R. *vs.* Forsythe, 159 U. S., 62.

So that we contend in the first place, there is a total failure of any proof of ratification, and in the second place, this case does not come within any of the principles of equitable estoppel.

The correct rule is laid down in Hoffman *vs.* Coal Co., 16 Md., 508, where the court says: "to render the act ratification effecutal, the principal must have been aware of every material circumstance of the transaction, and his act of ratification must have been founded on complete information, and in addition he must not only have been acquainted with the facts but appraised of the law, how those facts would be dealt with if brought before a court of equity."

And in Reynolds *vs.* Insurance Company 34, Md. 289, it is stated: "A party will not be held to have waived his rights or be estopped by his conduct or acts unless it is shown that he acted with full knowledge of all the facts affecting his rights."

And in Tucker *vs.* Moreland, 10 Peters, 76, the court says: "Admitting that acts *in pais* may amount to a confirmation of a deed, still we are of the opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed *after a full knowledge that it was voidable.*"

We further contend that this contention of an estoppel *in pais* must fail for the reasons that there is no evidence that the plaintiff in error either requested, permitted, authorized, or knew of *Calvert's* application of any part of the $1,500 purchase money to or for the benefit of the four children of Lucy V. Elkin, or that Calvert had any authority either as executor or guardian to apply the proceeds of the sale to their support, nor does the record show what part of this supposed expenditure went to the benefit of this defendant, so that these transactions between the defendant and her uncle cannot be invoked to effect the rights of the parties to this action. If the defendant had gone to the plaintiff, Mrs. Hamilton, before the $1,500 had been paid and got from *her* orders for shoes or money, knowing her rights to repudiate the sale, the case would be essentially different.

Nor does it any where appear that the defendant was misled to her injury by any act or omission of the defendant, either during her minority or her majority, for the plaintiff and her daughter both say that the improvements had to be made and were made in order to render the property habitable, and the plaintiff says she made no improvements after 1885; so that instead of being misled or lulled into security by the inquiries of the plaintiff after her majority, it would seem the defendant was put on her guard with respect to the plaintiff's claim of title.

VI.

**General or Separate estate?**

Did the defendant's mother, Lucy V. Elkin, hold the property in dispute as her statutory separate estate, or did she hold it as her general property, subject to all her common law disabilities as a married woman?

The original Act of the 10th of April, 1869, is in these words:

"In the District of Columbia, the rights of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts, but such married women may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried." (16 Stat., 45.)

In the revision the revisors broke this section into two sections and Sec. 727 is in these words:

"In the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband shall be as absolute as if she were unmarried, and shall not be subject to the debts of her husband or liable for his debts."

And Sec. 728 in these words:

"Any married woman may convey, devise, or bequeath her property, or any interest therein, in the same manner and with like effect, as if she were unmarried."

In the case of Sykes *vs.* Chadwick, 18th Wal., 141, Mr. Justice Bradley in the opinion said that:

"By the Act of 1869, the plaintiff as a married woman acquired the capacity at law to receive property to her separate use and subject to her separate and exclusive

control, as if she were unmarried, provided it does not come to her by gift or conveyance from her husband, *by which is undoubtedly meant, voluntary gift or conveyance.*" (the italic being ours.)

A *voluntary* conveyance is well defined to be a conveyance without *adequate* consideration, 2d Bouv., L. D., 645, and an *adequate* consideration "is a consideration of equal value of the thing obtained for it." There was some evidence tending to prove that several small sums of money coming from Solomon Elkin for the benefit of the family and some of the wife's savings were used in improving the property; but if it be conceded that all the money mentioned by all the witnesses had moved Elkin to convey the property to his wife it would not have taken the conveyance out of the class of *voluntary* conveyances. The meagerness of the price paid would have condemned it as evidence of a real sale in good faith to a *bona fide* purchaser.

And we further submit and contend that it is quite immaterial what equities existed between Elkin and his wife that *might* have been made the consideration of the conveyance, unless it is proved that they *were* the actual producing cause of the conveyance being made. Not one of the witnesses even attempts to state that such was the real moving cause or consideration.

On the contrary, Fred Calvert, her brother and engineer of the transaction, tells the whole story when he says: "People were coming to him with bills. He said he wanted to make it over to his wife so that they could not touch it, or something like that." (Rec., p. 19.)

And further on he said, "I do not remember whether I paid him anything for it or not. I suppose the five dollars passed through our hands just as a matter of form so as to make it over to his wife. I may have passed the five dollars over to Mr. Elkin and had it passed back

again to me. But I suppose that was the extent of the money that was furnished when the deeds were executed. Mr. Elkin wanted to make the property over to his wife and that was all there was of it." (Rec., p. 21.)

The history of Lucy V. Elkin's title is this: Abram Elkin was the owner of the property. He and his wife united in a deed to his wife's brother, the consideration being $5.00. By another deed, executed by the same officer, on the same day, and recorded at the same time, the title was immediately conveyed back to the wife, the consideration in this deed also being $5.00, and both deeds were delivered by the Recorder to Abran Elkin, after having been copied into the public records.

The circumstances all show beyond a reasonable doubt that this transaction is the familiar one by which men place the title to their real estate in the names of their wives for family reasons, through motives of prudence, or a desire to ensure a home for their families, and in the absence of any proof whatever to the contrary it must be held to be a voluntary conveyance. In addition to this, however, the consideration expressed in the deeds shows that the conveyance from the husband to the wife was a voluntary one, and that he received no adequate equivalent for the transfer. The consideration appearing on the face of the paper will be taken to be true until the contrary appears. There is no proof that Abram Elkin received any actual value for this conveyance, and not only is it the presumption that the conveyance was voluntary, but it is so proved. In support of the proposition that the sum named in a deed will be taken *prima facia* to be the actual sum paid in the absence of other proof, we refer to the following authorities.

3d Washburn on Real Property, (5th edition) p. 619.

Belden *vs.* Seymour, 8 Conn., 310.

Clements *vs.* Landrum, 26 Ga., 401.

At common law, husband and wife, by reason of the marital relation, were incompetent to contract with each other and a deed from one directly to the other was at law a nullity, and passed no title. Where the husband desired to vest title in the wife, a conveyance was made to a third party, who in turn conveyed back to the wife. Although in a case of this sort the title of the wife is apparently derived from the third party and not from the husband, it has been often decided that the wife's estate is not the separate property contemplated by section 727, of the Revised Statutes relating to the District of Columbia.

In the case of Kaiser *vs.* Stickney, 131 U. S. CLXXXVII, (appendix of omitted cases) it was expressly so decided. This report does not contain a statement of the facts, but in 3 McArthur, (D. C.) 118, or in Vol. 26, page 176, Lawyers' Coop. Edition of the United States Supreme Court Reports, where the same case is reported, it will be found that Henry Kaiser conveyed the property in dispute to Frederick Johnson, who immediately conveyed the same to Caroline Kaiser, the wife, in fee simple, and by reference to Liber 581, page 153, of the Land Records of the District of Columbia, it will be seen that the two deeds in that case were precisely like the two deeds in the present case, so far as this question is concerned. This conveyance to Mrs. Kaiser as the Court in General Term said was perfectly good for the purpose of vesting title in her independently of the Married Woman's Act of 1869, but in regard to her control over the estate she was not to be regarded as a *feme sole*, and as was said by Chief Justice Waite, in 131 U. S., "it is very clear that the property in question was not, under the provisions of Section 727 of the Revised Statutes of the District of Columbia, the sole and separate property of Mrs. Kaiser, but it was her general property."

In Williams *vs.* Reid, 19 D. C., 46, the Court in Gen-

eral Term, speaking through Mr. Justice Hagner, said in relation to the character of the wife's estate derived from her husband through the intervention of a third party, that "the whole property originally belonged to the husband, and was vested in her in consequence of his gift, and the formal fact that it was conveyed by them both to Thompson for the purpose of securing to her the part she now holds, does not change the principle."

This is undoubtedly the law, and if it were not so the language of the Married Woman's Act would be meaningless. That act especially exempts from its operation the title to real estate derived by conveyance from the husband, and the only way in which a married woman could derive real estate from her husband was through the intervention of a trustee and to the same effect is the recent case in the District Court of Appeals in the case of Cammack *vs.* Carpenter, 3 App. (D. C.) 219, where one George A. Lane and wife conveyed to J. J. Johnson, who immediately conveyed back to the wife. Chief Justice Alvey, in delivering the opinion of the court, says: "The deed to Mrs. Lane from Johnson was in effect and contemplation of law a conveyance of an estate from her husband, Johnson being the mere medium for the transfer of the title from the husband to the wife. The property, therefore, was not acquired in a manner nor from a source to make it her separate and absolute property within the meaning of Section 727, &c., so that we submit that the construction of this Act of Congress has become a Rule of Property in this District by an unbroken series of many judicial decisions and should be adhered to in this case.

VII.

*This property being the general property of the wife and not her statutory separate estate, she could transmit the same or the heirs, but she could not dispose of it by will.*

It being conceded on both sides that Mrs. Lucy V. Elkin at the time of her death had a fee simple estate in the land in question, the plaintiff made out her case by proving her heirship, and unless the defendant can vindicate her claim of ownership by establishing the validity of Mrs. Elkin's will, and the deed made thereunder by the executor, necessarily the plaintiff must recover. The controlling questions, therefore, are the validity of the will and the power of the executor thereunder. At common law a *feme convert* had not only no power to make a will of real estate, but she could not make a testament of chattels without her husband's consent.

Black. Com., Book 2, p. 498;
4 Kent, 505;
2 Dess. ch. Reps., 66.

The reason of this rule is that according to the theory of common law, a wife's identity was to a large extent merged in that of her husband. She was not *sui juris*, not a free agent. She was under the power and control of her husband, and in addition to that, her incapacity to make a will depended largely on the fact that she had nothing to dispose of. Indeed, it is well settled that except in a representative capacity, or by virtue of a power, a married woman at common law had no power to dispose of a freehold estate by will. In the Statute of 34 and 35 Henry VIII, Chap. 5, Sec. 14, referred to in 1st Jarman on wills, p. 58, it was expressly enacted that wills of married women were null and void, not because the disability was unknown to the common law, but because it was apprehended that the general terms of the prior act of 32 Henry VIII might be taken to have removed her preexisting common law disabilities. That at common law a married woman had no power to devise her real estate, see

Shep. Touch., 402.
2 Black., 497.
2 Kent Com., 170.
3 Com. Dig., 13.
Powell on Devises, 97.
Marston *vs.* Norton, 5 N. H., 205.
Osgood *vs.* Breed, 12 Mass., 525.
Gebb *vs.* Rose, 40 Md., 387.
Van Winkle *vs.* Schoonmaker, 15 N. J., Eq., 384.
Bradish *vs.* Gibbs, 3 Johns. Chan., 523.

So that at the time of the passage of the Married Woman's Act of 1869, undoubtedly the will of a married woman attempting to dispose of real estate was null and void, and if the common law in the District of Columbia has been changed at all, we must find the change within the limits of that statute.

Section 727, of the Revised Statutes relating to the District of Columbia, provides that "in the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance, from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the debts of her husband or liable for his debts."

Section 728 provides that "any married woman may convey, devise, or bequeath her property, or any interest therein, in the same manner and with like effect, as if she were unmarried."

If section 728 stood alone it might be argued, that by this section a married woman was given power to dispose of all kinds of property either by will or by deed, whether the property was her general estate, or was acquired in the manner prescribed in section 727. But this is manifestly not the meaning of the law. If it were,

section 727 might as well be stricken from the statute books. The property referred to in section 728, is the *same* property as that mentioned in section 727, and this is perfectly apparent from a reading of the original act in Vol. 16, p. 45, of the Statutes at Large. The language there is as follows:

"The rights of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts, but such married women may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as she were unmarried."

It is only therefore as to her separate estate, acquired in the manner pointed out by this statute, that is *in some other way than by gift or conveyance from her husband*, that a married woman can make a valid will of real estate. With respect to her general property, as is her property in the present case, she holds it subject to her common law disabilities.

In the case of Cammack *vs.* Carpenter, above cited, it was held that a deed made by a married woman, but not made in the manner pointed out by Section 450 and 451 of the Revised Statutes of the United States relating to the District of Columbia, was void and of no effect. At common law she had no power to make such deed, and she had not brought herself within the requirements of the statute changing the common law rule. Here, it must be conceded that at common law Mrs. Elkin had no power to dispose of her real estate by will, and the Married Woman's Act of 1869, does not change the rule ex-

cept as to her statutory separate estate. This, we respectfully submit, independently of other considerations is conclusive of the present case.

## VIII.

*There was no competent evidence offered at the trial to prove the validity of the will of Lucy V. Elkin, and the title claimed by the appellant thereunder.*

At the trial the plaintiff as part of her case in chief, and for the purpose solely of proving that she and the defendant claimed title from the same common source, offered in evidence "the record of the paper purporting to be the last will and testament of Lucy V. Elkin," and the deed thereunder from Calvert, the executor named in said paper to Mrs. Hamilton the plaintiff in error here. The plaintiff, however, not deeming it safe to rely upon this evidence of claim of title from the same common source, and upon objection being made to the introduction of the record of the proceedings of the Orphans' Court, (although that objection does not appear in the present record) abandoned the Orphan's Court Record as proof of her title, and afterwards by leave of the court first had and obtained (Rec., p. 25) traced her title regularly from the State of Maryland. But if the record of the probate of Mr. Elkin's will be considered in the record at all, it was offered for the sole purpose of showing a *claim* of title on the part of the defendant. The plaintiff did not attempt to prove the execution of the will and did not offer it in evidence for any other purpose whatever, and the defendant (plaintiff in error here) did not produce the original will and did not offer it in evidence at all. Consequently the offer of the plaintiff of the record of the Orphans' Court did not constitute proof of the due execution of the will as a valid

instrument to pass the title to real estate, and conceding as we must, that the plaintiff had made out a *prima facie* case by tracing her title from the State of Maryland the defendant's case wholly fails. There was no sufficient proof on the part of the defendant of the paper purporting to be Mrs. Elkin's will. It was not shown to have been executed in the form required by law. It did not appear that Mrs. Elkin ever signed it at all, and the probate of this paper in the Orphans' Court of the District of Columbia is not sufficient evidence of the validity of the paper as a will of real estate.

Robertson *vs.* Pickrell, 109 U. S., 608, 610.
Darby *vs.* Mayer, 10 Wheaton, 465, 471, 472.
Smith *vs.* Steel, 1 Har. & McH., 416.
Michael *vs.* Baker, 12 Md., 158.
Buchanan *vs.* Turner, 26 Md. 1.

In the case of Robertson *vs.* Pickrell *supra*, 486, this court speaking through Mr. Justice Field says: "By the law of Maryland which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common law rule prevails on that subject. The Orphans' Court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also; but the probate is evidence of the validity of the will, only so far as the personal property is concerned. As an instrument conveying real property, the probate is not evidence of its execution. That must be shown by a production of the instrument itself and proof of the subscribing witnesses, or if they be not living by proof of their handwriting" and that doctrine was affirmed in the case of Campbell *vs.* Porter, 162 U. S., 478. So that it is respectfully submitted, even if this court should not agree with the Court of Appeals of the District of Columbia as to the nature of

the estate held by Mrs. Elkin, or her power to make a valid devise of it, the court is not judicially advised by the record before it, that she ever attempted to devise the property involved in this litigation, and that the judgment below should not be disturbed on either of the grounds referred to.

## IX.

After most of the foregoing pages were in print, a copy of the brief filed in this court has been handed us, and as some of the grounds urged for reversal were not insisted upon in the court below, and for that reason have not heretofore been considered. It is insisted by the plaintiff in error, that the language of the deed to Mrs. Elkin was sufficient to create in her an equitable separate estate which she had power to dispose of by will. It is undoubtedly true that in equity a married woman independently of the provisions of the Married Womans Acts, might dispose of real or personal property which was limited to her sole and separate use, but to create this right in the wife the limitation to her separate use in order to oust the marital rights of the husband must be clearly established by the terms of the instrument creating the estate. As was said by Chief-Justice Alvey in 4 Appeals, D. C., 488, "If the gift or conveyance be designed to be for the wife's separate and exclusive use that intention will be fully acted upon and carried into effect. But the question is whether the instrument of conveyance shows plainly that to have been the intention of the parties to it, for as was said by Judge Storey 'the purpose must clearly appear beyond any reasonable doubt, otherwise the husband will retain his ordinary legal and marital rights in the property' indeed in all cases the words must manifest an unequivocal intent to exclude the power and marital rights of the husband.

The rule is thus stated in Pomeroy's Equity Jurisprudence, Vol. III, page 22, section 1102: "No particular form of words is necessary in order to vest property in a married woman for her separate use, and thus to create a separate estate. * * * The intention, however, must be clear and unequivocal not merely to confer the use upon the wife for her benefit, *but also to exclude the husband.* The doctrine was very concisely and accurately stated by Vice-Chancellor Molins in a recent case: 'There must be in a will or in any other instrument an intention shown *that the wife shall take and that the husband shall not.*'"

In the notes to section 1102 of Pomeroy above referred to, most of the cases English and American are cited, and from an examination of these cases, it will appear that a mere limitation to the sole use and benefit of the wife will not be sufficient to create in her an equitable separate estate.

In Lippincott *vs.* Mitchell, 94 U. S., 767, this court, speaking through Mr. Justice Swayne says: "No particular words or phrases are necessary to create an equitable, separate estate. The court will examine the whole instrument and look rather to the intent manifested than to the language employed. The creative intent must clearly appear. Doubts are resolved in favor of the husband's marital rights. * * * If it were intended by this deed to give the wife a separate estate it is remarkable that in the mass of redundant verbiage employed no words clearly apt for that purpose are to be found. It is remarkable that if such an intent existed the phrases "for her separate use" or "for her exclusive use," or "free from the control of her present or any future husband" or some equivalent for one of them were not inserted. The only part of the deed which gives a shadow of support to the proposition of the appellants is

the language of the *habendum*. The same language is to be found in many precedents in books of forms where certainly there was no purpose to create a separate estate." In that case the language of the *habendum* was "unto the said Nannie C. Mitchell, her heirs, and assigns, to the sole and proper use, benefit, and behoof of the said Nannie C. Mitchell, her heirs, and assigns forever," and the court held such language insufficient to create an equitable separate estate in the wife. In the present case, the only words that could be construed into creating an equitable separate estate in the wife are also found in the *habendum* (Record, p. 12) and the words are almost identical with those referred to in 94 U. S., the language being, "To have and to hold the said piece or parcel of land and premises with the appurtenances unto the said party of the second part, her heirs, and assigns to and for her and their sole use, benefit and behoof forever." These identical words are to be found in ninety-nine out of every hundred deeds in fee simple of record among the Land Records of the District of Columbia, whether the grantee be a married woman or not. They are inserted in all the forms in common use for the purpose of bringing the conveyance within the operation of the statute of uses and it was never before contended that they were operative in the case of married women to create in them an equitable separate estate to the exclusion of the ordinary marital rights of the husband. It seems to be conceeded in the brief filed on behalf of the plaintiff in error, that the decision in the case of Lippincott *vs.* Mitchell would be controlling were it not for the circumstance that in the present case the conveyance was from the husband himself to the wife, and for that reason a different rule of construction should prevail, the argument being that in such a case all the presumptions should be resolved as against the husband, and

that because he made the conveyance to his wife, the husband intended to strip himself of all his marital rights with respect to his property.

With reference to the cases cited upon the brief of plaintiff in error from pages 7 to 21, it is sufficient to state that these cases arise upon the construction of wills by courts of equity, in which the grantor, in addition to the use of words apt for the creation of a separate estate in the wife, manifested a clear intention to exclude the marital rights of the husband.

In this case, however, the defendant seeks to rely upon a purely equitable title in an action of ejectment when only legal defences can be availed of, as shown in the following cases.

Johnston *vs.* Christian, 128 U. S., 374.
Bragnell *vs.* Broderick, 13 Pet., 436, 450.
Hooper *vs.* Schneider, 23 How., 235.
Langdon *vs.* Sherwood, 124 U. S., 74.

The circumstance that this is a transfer from husband to wife is against rather than in favor of the construction that the husband intended to strip himself of all future benefits from the property, since he must be held to have known that while the legal title was effectually vested in the wife, he was entitled to hold possession during life and so to escape the demands of creditors. This fact, together with the meager evidence in the record (Rec., p. 19) that Elkin made conveyance to place the property beyond the reach of his creditors all negative the idea that the husband intended to exclude himself from all further connection with a benefit to be derived from the property conveyed. There is no evidence in the record, tending to show that the husband intended to make a settlement upon the wife for her sole and exclusive benefit and there is no recital in the deed

itself tending to show that he intended to strip himself of all further or future control over or interest in the property conveyed, and in the absence of any such showing, it is submitted that the ordinary rules of construction should prevail.

X.

*The assent of the husband to the execution by the wife of a will disposing of real estate, is not sufficient to give such a will validity, and there is no evidence whatever in this will that any such assent was given.*

That the assent of the husband is insufficient to enable a married woman to dispose of her general property by will, we refer the court to the following cases.

Osgood *vs.* Breed, 12 Mass., 525.
Moore *vs.* Thompson, 4 Cush., 563.
Marston *vs.* Norton, 5 N. H., 205.
Wakefield *vs.* Philips, 37 N. H., 295.

But apart from this question there is absolutely no evidence in this record tending to show that prior to the death of his wife, Elkin had any knowledge whatever that she had made a will or intended to make one, and there is no evidence whatever that he acquiesced in or permitted or directed the execution of any will. Whatever knowledge Elkin may have had of the will after his wife's death or whatever acquiescence by him in its provisions *after* her death there may have existed cannot play any part in the present controvessy. This is not a suit between the plaintiff in error on the one side and Mr. Elkin or those claiming immediately under him, on the other hand upon the death of Mrs. Elkin, the rights of her children became fixed and absolute and nothing that Mr. Elkin did or omitted to do could affect the rights of his children.

With regard to the suggestion, rather than contention, that Mrs. Elkin's will was not a will of real estate but a will of personalty because by the terms of the will a conversion of the real estate into money is directed, it need only be said that no such conversion can be said to arise until after the death of the testatrix. The validity of the will in question must be determined by the capacity of the testatrix and the nature of the property derived *at the time the will* was executed.

The plaintiff in error next contends that by force of the Maryland Act of 1798, the common-law disability of a married woman to make a valid will of real estate has been removed, and that by virtue of its general provisions, a married woman is rendered just as competent to dispose of her property by will as any other person. It is contended that by force of the Act of 1798 the disability created by the English statute of 34 and 35 Henry VIII, Chap. 5, Section 14, has been removed and the provisions of that statute repealed. But it is a mistake to suppose that the disability of a married woman to make a valid devise is the creature of that statute. Her disability existed by reason of her coverture independently of the institution of the statute, and in the Statute of 34 and 35, Henry VIII, (referred to in 1st Jarman on Wills, p. 58), it was enacted that wills of married women were null and void not because the disability was unknown to the common law but because it was apprehended that the general terms of the prior Act of 32, Henry VIII, might be taken to have removed her pre-existing common law disabilities. If the English Statute of Wills was never in force in the State of Maryland as seems to be contended for in the brief filed on behalf of the plaintiff in error, then there never was any legislative or common law power to make a valid will in the State of Maryland until the year 1798. Married women were not given any power

by the express terms of this statute, to make a will, and there is no hint anywhere that it was intended to remove her pre-existing disabilities. The adjudications in the State of Maryland are all against the idea that the force and effect of the Statute of 1798 had any such sweeping effect as is contended for.

In the case of Buchanan *vs.* Turner, 26 Md., 1, decided in 1866, it was held that under the provisions of the various enabling statutes in Maryland, while the property of a married woman not limited to her sole and separate use was protected from liability for the debts of the husband, his marital rights over it remained unimpaired. Property so held by a married women, she could not dispose of by last will and testament except with the consent of her husband, and by an instrument executed and acknowledged as prescribed by the 6th section of the Act of 1842, chapter 293.

And so in the case of Bridges *vs.* McKenna, 14 Md., 258, decided in 1859, the court says that as to the general property of a married woman, not limited to her sole and separate use, the marital rights of the husband remain unimpaired.

See also Insurance Co. *vs.* Deale, 18 Md., 26.
Weems *vs.* Weems, 19 Md., 334.

Upon this branch of the case we submit that there is not the slightest foundation for the contention that there was no such thing known as a common-law disability to make a will by reason of coverture, nor for the contention that the statute of wills never was in force in the State of Maryland, and that the testamentary Act of 1798 has the sweeping force and effect as is claimed for it. The courts of Maryland have never sustained any such contention and no case is cited in support of it.

It is not contended seriously that the provisions of the Married Women's Act of 1869, as originally enacted conferred upon Mrs. Elkin any power to dispose of real estate not her separate estate under the terms of that act or that was not limited to her sole and separate use. It seems to be conceded that as to her general property that act does not remove Mrs. Elkin's common-law disabilities, but the argument is that the language of the revision does have that effect.

The language of the original Act of 1869, is as follows:

"In the District of Columbia, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband shall be as absolute as if she were a *femme sole*. * * * Such married woman may convey, devise, and bequeath *the same*, or any interest therein in the same manner and with like effect as if she were unmarried."

In the revision this act was split into several sections, section 727 defining what shall be the separate estate of the wife and section 728 providing that "any married woman may convey, devise, and bequeath *her property*, or any interest therein in the same manner and with like effect as if she were unmarried."

The question then is what is meant by the words "her property" used in the revision? Does it mean her property generally; does it mean property limited to her separate use or does it mean the property referred to in the section immediately preceding? For the purpose of construing this language, recourse should be had to the Act of Congress providing for the revision of the Statutes of the United States and the powers of the Commissioners thereunder.

By act approved June 27, 1866 (14 U. S. Statutes, p.

74) the Commissioners are directed "to *simplify, arrange, and consolidate* all the statutes of the United States, general and permanent in their nature which shall be in force at the time such Commissioners shall make the final report of their doings."

Section 2 provides that "in performing this duty the said Commissioners shall bring together all statutes and parts of statutes which similarity of subject, ought to be brought together, omitting those redundant or obsolete, *and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text.*"

From the reading of this act, it would appear that the powers of the Commissioners is limited to making such alterations as may be necessary *to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text.*

In dividing the original act into sections, consisting of independent sentences it was obviously impracticable to retain in the revision the words "the same" used in the original act; of necessity the verbiage had to be changed, and the revisors instead of using the words "the same" used the words "her property", the meaning being the property referred to in every other section of the act, and in relation to which the act was intended to operate. It is not conceivable that by the revision it was intended to enact such substantive legislation so radical in its nature and so far reaching in its effect as the construction contended for on the other side would lead to. The most that can be said is that the revision has given rise to a doubt as to the meaning of the statute, to resolve which doubt recourse might always be had to the original text.

Cambria Iron Co. *vs.* Ashborn, 118 U. S., 54.

United States *vs.* Lacher, 134 U. S., 624.

In the case of Kaiser *vs.* Stickney, 131 U. S., Appendix CLXXXVII, the deed was not executed until *after* the passage of the Married Womans Act of 1869, and not *before* the passage of the act as stated in the brief of plaintiff in error. In the hearing of this case before the Court of Appeals of the District of Columbia, the original record of the deed from the office of the Recorder of Deeds was produced in open court and exhibited to opposing counsel to verify our statement as to the date of the deed in controversy, and while that may not be practicable in this court, the fact is as we have stated it. In the case of Kaiser and Stickney, above referred to, it was held by this court that property vested in the wife, such as was the property in controversy, was held by her subject to her common-law disabilities.

The case of Cammack *vs.* Carpenter, 3 Appeals D. C., 219, is to the same effect, and the decision there was that a married woman had no power to dispose of her general property by deed, and if she had no power to convey, she had no power to devise.

We contend further that the bill of exceptions appearing in this record is not in such shape that this court can disturb the judgment of the trial court or of the Court of Appeals. It nowhere appears that the bill of exceptions contains all the evidence. The certificate of the trial justice does not so state and it does not appear from the context.

The bill of exceptions must be certified by the judge and must show on its face that it contains all the evidence touching the questions involved in the assignment of error, otherwise the judgment must be affirmed.

Rollins *vs.* Gunnison, 80 Fed. Rep., 692.

R. R. Co. *vs.* Washington, 49 Fed. Rep., 347.

Elliott's General Practice, Sec. 1068.

Taylor *vs.* Hage, 32 U. S. Ct. of Appeals, 548.

Finally, as to the question of consideration for the conveyance to Mrs. Elkin moving from her to her husband, as to the question of estoppel and the presumption of death, upon all of which the plaintiff in error contends that she was entitled to go to the jury and that on this account the trial justice erroneously directed a verdict in favor of the plaintiff, we submit that the rule as stated by this court is that "in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed.

Anderson *vs.* Beal, 113 U. S., 241, and as was stated in Herbert *vs.* Butler, 97 U. S., 319. "Although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury but may direct them what verdict to render; and in the case of Pleasants *vs.* Fant, 22 Wall., 116, the court says "Where the record is such that the court would be compelled to set a verdict aside as not founded upon sufficient evidence the court is not justified in going through the idle ceremony of submitting to the jury the testimony on which the plaintiff relies when it is clear to the judicial mind that if the jury should find a verdict in favor of the plaintiff the verdict would be set aside.

Applying this rule to the case now before the court we submit with all confidence, and without further discussion that there is not a particle of legal evidence in this record to overcome the presumption of Elkin's death which the law implies from the undisputed evidence, there is not a particle of evidence that the plaintiff knowingly

ratified the unlawful and unauthorized sale made by Calvert, the executor of Mrs. Elkin's will, and there is no evidence whatever that at the time of the conveyance to Mrs. Elkin she gave anything of value to her husband as a consideration for the conveyance. It is therefore respectfully submitted that the judgment below should be affirmed.

H. G. MILANS,
M. J. COLBERT,
*For Defendant in Error.*

# APPENDIX.

## IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

GRACE A. B. RATHBONE, *Appellant*,
*v.*
FRANCES REBECCA HAMILTON. } No. 320.

*Filed November 9, 1894.*

Appeal from judgment of special term of Supreme Court of District of Columbia, at law, No. 31,827, Bradley, J., in favor of defendant in action of ejectment. *Reversed and cause remanded.*

Messrs. HAMILTON & COLBERT and H. G. MILANS for appellant.

Messrs. A. A. LIPSCOMB and PHILIP WALKER for appellee.

Mr. CHIEF JUSTICE ALVEY delivered the opinion of the court:

This is an action of ejectment brought by the appellant as one of the heirs at law of Lucy V. Elkin, deceased, against the appellee to recover an undivided third part of an acre of land, situate in the District of Columbia. At the trial below a verdict was directed to be returned for the defendant, and the plaintiff has appealed.

Both parties claim to have derived title from a common source, that is, from Mrs. Lucy V. Elkin, deceased, the plaintiff as heir at law, claiming by descent, and the defendant as purchaser, claiming by virtue of a sale made under the will of Lucy V. Elkin. The facts of the case,

so far as the leading and important questions are concerned, are but few, and about which there is no dispute.

It appears from the record that, on the 29th day of April, 1872, Abram Elkin, Jr., the husband of Lucy V. Elkin, since deceased, was owner of the land in controversy, and on that day he (his wife joining with him), for the nominal consideration recited of five dollars, conveyed the property to Frederick G. Calvert, the brother of the wife, Lucy V. Elkin; and on the same day, and as part of one and the same transaction, the brother, Frederick G. Calvert, for the like nominal consideration of five dollars, recited in the deed, reconveyed the property to the said Lucy V. Elkin, and both deeds were at the same time filed for record, and were recorded together. They appear to have been executed and acknowledged before the same justice of the peace, and the deed from Calvert and wife to Mrs. Elkin is an exact transcript of the deed from Elkin to Calvert, *mutatis mutandis*. After they were recorded, both deeds were at the same time delivered to Abram Elkin, the husband, according to the memorandum made upon the record by the recording officer.

Being thus invested with the fee simple estate in the property, Mrs. Lucy V. Elkin, on the 22d day April, 1876, made what purports to be her last will and testament, executed in due form, and which was, after her death, admitted to probate. By this will she devised the real estate to be sold, and the proceeds of sale to be distributed, and she appointed her brother, Frederick G. Calvert, her executor. Shortly after the date of her will Mrs. Elkin died, and left her husband and three children surviving her. Her husband, soon after his wife's death, left the District of Columbia, and has not since been heard of by his family; and whether he is dead or alive

is a question about which there is no positive proof in the record, except the length of time since he was heard of, and the question was not submitted to the finding of the jury.

Acting under the will as executor, Calvert, sometime after obtaining letters testamentary upon the estate of his sister, sold and conveyed the real estate in controversy to the defendant, Frances Rebecca Hamilton, who took possession of the property and still holds the same, claiming ownership thereof by virtue of the sale and conveyance made to her under the will of Lucy V. Elkin, deceased.

At the trial, assuming all the material facts to be undisputed, the plaintiff prayed the court to instruct the jury to return a verdict for the plaintiff, and the defendant, on the other hand, prayed the court to instruct the jury that, upon the whole evidence, they should return a verdict for the defendant; and this latter instruction was granted, and the former refused. To these rulings the plaintiff excepted.

The first question is, from whom and how did Mrs. Lucy V. Elkin, under whom both parties to this action claim, really acquire the property, and what was the nature of the property as she held it. Did she acquire and hold it in her common law right as a feme covert, or did she acquire and hold it as her separate statutory estate, as if she were not married, under Section 727 of the Revised Statutes of the United States relating to the District of Columbia? This depends, of course, upon the terms of the statute, and the nature of the transaction as shown by the deeds.

The section of the statute just referred to is part of the revision of what is generally known as the Married Woman's Act, of the 10th of April, 1869, 16 Stat., 45. The section as it stands in the revision is as follows:

"Sec. 727. In the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than *by gift or conveyance from her husband*, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband nor be liable for his debts."

Now, if the wife acquired the property in question by gift or conveyance from her husband, she did not hold the same as absolutely as if she were unmarried; but she held the same as her general property, as by the common law she was authorized to acquire and hold real estate, and not as her statutory separate estate. And assuming the facts to exist as they are stated in the record, there is no escape from the conclusion that the property was acquired by gift or conveyance from the husband, though it was through the brother of the wife of the grantor as mere medium of transfer of title. There is no attempt to show that there was any real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character; and all the facts attending the transaction show beyond doubt that the real purpose and design of the husband was to transfer from himself to his wife the title to the property. The passing the title through a third party in no manner changed the effect of the transfer. Though the agency of a third party was employed, it was no less in legal effect and contemplation, a gift or conveyance from the husband to the wife. Indeed, if the exception in the statute could be avoided by adopting such a facile method of conveyance to the wife as that here employed, such exception would simply be rendered nugatory, and would have better been omitted from the statute. The deed, however, to the wife was completely effective, and vested in her the legal title to the property, but she held such property

as her general estate, subject to her common law disabilities as a feme covert. This has been expressly held, in reference to this very statute, and in a case like the present, where the title to the wife was conveyed by the husband through the medium of a third party. Kaiser *v.* Stickney, Bk. 26, L. C. Ed. Sup. Ct. Rep., 76; S. C., 131 U. S., 87, of appendix of previously omitted cases. And so in the case of Cammack *v.* Carpenter, 1 App. Case, D. C., (Wash. Law Rep., Vol. 22, page 302.) These cases, just referred to, arose since the Married Woman's Act of 1869, and were decided in reference to the provisions of that act; and it was expressly held, that the property so acquired by the wife was held by her *as her general property*, which she could only convey by uniting with her husband in a deed executed in the form required by Secs. 450, 451 and 452 of the Revised Statutes relating to the District of Columbia. See, also, the case of Williams *v.* Reid, 19 D. C., 46. It is clear, therefore, that Lucy V. Elkin did not acquire and hold the property in controversy under the statute as if she were unmarried.

2. It is contended, however, that even though it be conceded that the wife took the property as her general estate, according to the common law, yet the statute clothed her with full power of disposal of the property, either by deed or will. And it is upon the terms of the next succeeding section, 728, of the Revised Statutes of the District, that such contention is founded. That section is in these terms:

"Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried."

Both this and the preceding section, 727, have marginal references to the original Act of 1869, Ch. 23, Sec. 1 (16 Stat., 45), as the source from which the text of the

two sections, 727 and 728, was made. There is nothing to indicate, apart from some slight verbal changes or omissions of phraseology, that there was any design to change or extend the original provision of the Act of 1869, Ch. 23, Sec. 1. At most this change of phraseology could but give rise to a doubt as to the meaning of the statute.

Before this Act of Congress of 1869, according to the principles of the common law in force in this District, a married woman had no power or capacity to convey the legal title of her real estate without the joinder of her husband; nor had she any power or capacity to devise her lands by will, being expressly excepted out of the Statute of Wills of Henry VIII. She was and is, however, competent to convey or devise by virtue of a power, and she may convey or devise her sole and separate estate in equity, except where restrained by the instrument creating the estate. Her land held by her as a feme covert at the common law was and is subject to the marital rights of the husband, and if he survives her, after the birth of a child, he is entitled to a life estate in the land by the courtesy.

Has this common law principle, then, been so far radically changed by this act of Congress that the wife, though acquiring the property as at the common law, and not under the statute, may convey by deed or devise the property as if she were unmarried, and thus deprive the husband of all his marital rights? It is not seriously contended that this was the effect of the Act of 1869, as originally enacted. But it is supposed that such is the effect of the change made in the phraseology of the revision.

As a rule of construction, it is laid down by the Supreme Court of the United States, that where the meaning of the Revised Statutes is plain, the court will not re-

cur to the original statutes to see if errors were committed in the revision, but may do so to construe doubtful language employed. Cambria Iron Co. *v.* Ashborn, 118 U. S., 54; United States *v.* Lacher, 134 U. S., 624.

In the last case just referred to, that of U. S. *v.* Lacher, the chief justice, in delivering the opinion of the court, said:

"If there be any ambiguity in Section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the Statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is and whether such change should be construed as changing the law. Citing United States *v.* Bowen, 100 U. S., 508, 513; United States *v.* Hirsh, 100 U. S., 33; Myer *v.* Car Co., 102 U. S., 111. And it is said that this is especially so where the act authorizing the revision directs marginal references, as is the case here. 19 Stat., Ch. 82, Sec. 2, p. 268; Endlick on Int. Statutes, Sec. 51. Accordingly we find that this section took the place of Section 279, of the Act of June 8th, 1872."

By the first section of the original Act of 1869, Ch. 23, it was enacted that—

"The rights of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a feme sole, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise or bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried."

In the revision this section of the original act has been

broken or divided into two short sections, 727 and 728. And the change of phraseology that has occurred does not seem to be more than was necessary and appropriate in making the new arrangement of the subjects-matter of the original section. That, as we have seen, confined the wife's separate power of disposal to the *same property* that she was authorized to acquire under the statute as separate estate. And we think the wife's power of disposal has not been enlarged or extended by the revision beyond what was given her by the original statute; and that did not apply to or embrace property acquired by gift or conveyance from her husband. The wife's power of disposal over property contemplated by the statute, is given either by deed or will; but as we have seen, it has been held expressly, in cases like the present, that the power of disposition by deed does not exist. Kaiser *v.* Stickney, supra; Cammack *v.* Carpenter, supra. And if the power could not be exercised by deed, for the same reason it could not be exercised by will.

3. But it has been contended for the appellee that, independently of the power given by the statute, the wife may dispose of her real estate that she holds to her sole and separate use, either by deed or will; and that the property in this case was held by the wife to her sole and separate use.

It is doubtless true that a married woman can, in equity, dispose by deed or will of the equitable fee simple of her real estate, and of the absolute interest in her personal estate which belong to her for her sole and separate use; since in respect to such property she is a feme sole. And, in respect to such property, it is immaterial that the legal estate is not vested in trustees, as the husband and all other persons on whom the legal estate may devolve, will be deemed and treated as trustees for the persons to

whom the wife has given the equitable interest. This is the established doctrine in the English Chancery, and it is the established doctrine of the courts of this country, to the same extent. Tylor *v.* Meads, 4 D. I. & S., 597; Pride *v.* Bubb, L. R. 7 Ch., 64; Cooper *v.* MacDonald, 7 Chan. D., 288; 2 Sto. Eq. Juris., Sec. 1380. If the gift or conveyance be designed to be for the wife's separate and exclusive use, that intention will be fully acted upon and carried into effect. But the question is, whether the instrument of conveyance shows plainly that to have been the intention of the parties to it; for, as said by Judge Story, "the purpose must clearly appear beyond any reasonable doubt; otherwise the husband will retain his ordinary legal and marital rights in the property." Indeed, in all cases, the words must manifest an unequivocal intent to exclude the power and marital rights of the husband. 2 Sto. Eq. Juris., Secs. 1381, 1382. But here, unfortunately for the defendant, there is nothing in the deed from Calvert to Mrs. Elkin to create a sole and separate estate in her, to the exclusion of the marital rights of the husband. The only clause in the deed which could possibly be supposed to have any such effect, is the ordinary habendum clause, which declares that the property was to be held "unto the said party of the second part, *her heirs and assigns*, to and for *her and their sole use, benefit and behoof forever.*" This is but a common formula found transcribed in all the several deeds in the record; the deed from Quinter to Abram Elkin, Jr., for the property in question, appearing to furnish the precedent for all the subsequent deeds for the same property. It clearly has no such effect as that of declaring a sole and separate estate in the wife. In the case already referred to, of Kaiser *v.* Stickney, supra, the deed to the wife contained the same formal habendum clause as that of the present deed, but it was not contended, nor even suggested, that

it was sufficient to create a separate and exclusive estate in the wife.

If, however, the deed contained an effective clause, creating a sole and separate estate, it could not avail the defendant in this action; for in an action of ejectment a legal estate or title is as necessary when title is relied on as a defense, as is such an estate or title to the right of the plaintiff to recover. A mere equitable estate could not be set up to defeat the legal estate.

4. It has been contended by the plaintiff here, the present appellant, that even assuming that Mrs. Elkin had power to dispose of the property by will, the executor named in the will had no power of sale, and that the sale made by him, therefore, was simply void. But in this we do not agree. If the right to make the devise of the estate existed, the testatrix directed her property, real and personal, to be sold, and after deducting funeral and other expenses, she directed how the proceeds of the sale should be distributed and paid out. The making of this distribution was a proper duty of the executor; and it is clear, we think, that the executor named in the will would have power to sell and convey the real estate, as he would have of the personal estate, raised by necessary implication. This would seem to be the settled construction of similar devises or directions to sell, without express power conferred. Magruder *v.* Peter, 11 Gill and John., 217; Peter *v.* Beverly, 10 Pet., 532; Taylor *v.* Benham, 5 How., 233.

Inasmuch as this case must be sent back to the court below for retrial, it is proper to advert to a question that must arise in the course of the trial, and that is, the question as to the right of entry of the plaintiff. That right depends upon the question, whether the husband of Mrs. Lucy V. Elkin is dead or alive. If alive, upon the assumption that Mrs. Elkin was without power to devise

the property, he would be entitled to his life estate by the courtesy, and until the termination of that estate, the plaintiff would have no right of entry in her character of heir at law of her mother and, consequently, no right to maintain an action of ejectment. To maintain the action the death of the father must be shown either by positive proof or presumption.

The judgment appealed from must be reversed and a new trial awarded.

*Judgment reversed, with costs to the appellant, and a new trial awarded.*

See. 22 Wash. Law Rep. 766.

## IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

SPECIAL TERM.

GRACE A. B. RATHBONE *vs.* FRANCES REBECCA HAMILTON. } AT LAW No. 31,827. EJECTMENT, ETC.

**Opinion of the Court below—Judge McComas.**

(After full argument.) "I have listened to the exhaustive discussion of the law based on the evidence of the witnesses, and, the decision of the Court of Appeals maps the course of this case and the limits within which this court had discretion upon the paper case of the plaintiff then, and more decidely as I apprehend now than then. The plaintiff must recover upon the strength of his own title. He has offered a patent and the subsequent conveyances, which the court has admitted as sufficient to prove the chain of title and make out the plaintiff's case

unless some one or other of the defences here urged, shall intervene.

In this trial the question recurs: was this property in controversy, the separate estate of Lucy V. Elkin, or was it an estate in fee which accrued to her by gift or conveyance from her husband? Upon the form of the conveyances and by force of their terms, the Court of Appeals concluded that the conveyance from Abraham Elkin, by means of a trustee, to his wife, Lucy V. Elkin, was a voluntary conveyance; and at that time no effort was made to show any real pecuniary consideration, which, it was competent, under the terms of that conveyance, for the defendant to show. That attempt is now made with great ingenuity and persistence.

After having had my mind refreshed as to every particle of evidence by the learned counsel on the one side or the other, on this motion on behalf of the plaintiff, to instruct the jury to return a verdict for the plaintiff, and the motion accompanying, of the defendant asking a like instruction for the defendant, looking at the plaintiff's case as proved, and then considering what there is of proof for the defendant, I find a failure to show in any of the modes sought to establish an interest in the payment of the purchase money, either out of gifts to her of money from her father-in-law, or other sources, or out of the accumulation of her own earnings, or by any testimony sufficiently definite, that money or any part of the consideration of the original purchase in 1867, was ever given by Lucy V. Elkin, to her husband upon such an express stipulation, agreement or understanding, as would constitute it a separate fund or estate in the hands of her husband. Nor is there any evidence of understanding or agreement, to support a conveyance of property in pursuance of any money transactions between husband and wife.

The evidence is vague, unsubstantial, inconclusive, not such evidence as that, if a jury should thereupon conclude that there was a valuable consideration to support the claim of the wife to a separate estate under that conveyance, the court could possibly let such a verdict stand.

I am, therefore,—of course it is a case of great hardship upon the defendant in this case—constrained to the conclusion that, with respect to the attempt to show a separate estate in the wife, the case is left now where it was when considered by this clear, and forcible *decision of Chief-Justice Alvey*, in reviewing the former trial.

If that be so, of course the will and proceedings thereunder passed no title.

Was there in this case such an estoppel as bars this plaintiff upon this paper title from maintaining this action? This defendant and this plaintiff had no relation in respect of this property. This plaintiff did nothing and said nothing to prejudice, to mislead, or to injure this defendant in respect of the sale of 1879, and in respect of the whole transaction of the payment of the purchase money up to the time of the conveyance of the property.

The tenant by the courtesy was the person to assert the right to possession until after the sale, conveyance, payment of purchase money, and improvements were all made. If there was prejudice to an estate and an injury to possession, it was as of his estate, and not as of the estate of the reversioner. During that period when these transactions occured, the plaintiff was under disability as an infant. If that be so, there is not such an estoppel as has been urged upon me, not as applying to this case, but urged to establish the proposition that an estoppel in *pais* is an adequate defense in an action of ejectment.

But what was more strongly relied upon, was a ratifi-

cation of the wrongful sale by Calvert, and a definite, clear election on the part of this plaintiff after reaching her majority, to take the proceeds instead of the property.

I have considered the proofs on both sides, to ascertain whether there was such ratification and sale and such an election by the plaintiff, with full knowledge of all the material facts of the whole transaction. The information upon the whole does not appear to have been definite, clear, and full, even considering the information gathered from the testimony of Mrs. Hamilton, of Mrs. Rathbone, and of Calvert, (who appears to have the facility of not knowing much about his own transactions about this estate).

In reviewing the finding of a jury upon the testimony as to the ratification by this plaintiff, or an election to accept the proceeds and abandon the property, coupling all the testimony, this court would be constrained at a later stage to set aside a verdict upon such testimony.

Admitting, now, the whole of the evidence, which, by counsel on both sides was admitted, subject to exception—assuming it all to be in and admissible—yet it is too attenuated as a demand on Calvert, with knowledge of the material facts, and with such information as should accompany a ratification of, or an election to follow the proceeds instead of the property. At best this plaintiff says in the printed report of the last trial that she was probably of age. That she "was probably of age" is not sufficient evidence upon which to allow a verdict to stand. Calvert says he thinks she was of age at the time of this much discussed transaction.

It seems to the court that, in respect of knowledge on the part of the plaintiff in respect of the clearness of proof that in fact there was anything done after she reached her majority to bind her as of a ratification of the transaction,

or that she with full knowledge of all the material facts intended to ratify, the single circumstance with respect to the shoes fails. Nor do the other little circumstances of evidence here and there eke out the case on behalf of the defendant.

Despite such a lack on behalf of the defendant, if there be a failure of ratification by this defendant, or a failure of election, and not sufficient evidence upon any ground to sustain it, there remains the other ground, viz: whether or not the life tenant (who, under the decision of the Court of Appeals, would be the person entitled to enjoy his estate before this reversioner in her own right) could maintain an action of ejectment. It is pertinent to remember that in courts of justice the presumption of survivorship or of death finds its beginning in the effort in 19 Charles II, Chap. 6, to establish by law a rule of presumptive evidence by which an Act of Parliament sought to redress these very inconveniences of want of proof of the decease of persons upon whose lives estates depend. By that statute the term of seven years was fixed as a definite space in respect of a tenant for life, whereby, at the end of such term, the person absent, not accounted for, not heard of, during a series of years should be presumed to be dead, in the interest of the possession and enjoyment of estate by the reversioners. The rules in respect of this legal presumption of death seem to be well stated in Lawson on Presumptive Evidence. It is for the court to apply these rules to the evidence in this case. When an absentee is shown not to have been heard from for seven years by the *person* who, if he had been alive, would naturally have heard from him, the absentee is presumed to have been alive until the expiry of seven years, and to have died at the end of that term. That brings up the consideration of the nature of such absence

in respect of which it is the rule that where the removal is temporary, absence alone, without being heard from, is sufficient to raise the presumption of death after seven years. If a man leaves his home, and goes off for a few hours' absence only but never returns, the mere fact of such temporary absence is itself sufficient to warrant the presumption of death. But in a case where the absence is permanent, without intention to return the presumption does not arise until inquiry has been made at the fixed residence, home or domicil of the person so absent and unaccounted for; and this inquiry must be made not only at the fixed residence, home or domicil, but from persons who would naturally have heard from him, whether they be relatives or strangers. Who, then, are such persons, and where is this home, residence or domicil of such absentee? By this same authority it appears what must necessarily be the rule of inquiry that the place from which he first departed is such residence, home, or domicil, and does not include places where the absentee may have afterwards resided or visited, especially as a temporary flitting or tramping manifestation of existence here or there.

In the state of the case now appearing, the District of Columbia is the place where this Abram Elkin had an estate by the courtesy; and where, it may appear that he still had money at interest. Here he was well-known. The very forum and jurisdiction in which this suit is now being litigated, is that whence he departed in 1876, the action having been brought June 13, 1891. If the inquiry is not to be made among the people here, where he had relatives, acquaintances and friends, it is pursued arbitrarily in other places; and it is in evidence that in some fashion or other some inquiry was made in Chicago, and in Philadelphia, where his mother formerly resided.

Her whereabouts in this case appear vague; there is some shadowy evidence indicating that she herself may have gone beyond seas with this absentee himself, more than seven years before the bringing of this suit. The father, it appears, was estranged from his son, and, although by relationship he would have been the person naturally to have heard from the son, he does not appear in this case to have been such person. Then there were three children, one of them a cripple. No matter how worthless, shiftless, or heartless a man may be, if he has three or four children, there is no place in this universe where his interests or inquiries or affections would be so likely to call him as their domicil; and here is where those children still remain, one of them known to this absconding parent to have been a cripple. His relatives and friends; Calvert, the executor of this will, the brother-in-law of this person, the last person addressed by him and familiar with and friendly to him—all resided here; and all of the available avenues of information have been explored and the results have been brought before the jury in this case.

The presumption of death is simply a *prima facie* presumption. But there has not been, so far as this court can find, any evidence to countervail that presumption of the law, the presumption defined in terms of the Statute in respect of just such estates and such controversies as the pending law suit—a presumption which can be rebutted in the forum whence he departed and where his right is now being litigated with better opportunities than in a distant land, as in Australia, or some other countries far away, where the absentee is traced by meager evidence.

So that, allowing the presumption to be but *prima facie*, the court cannot find any evidence in this case which

tends to countervail the legal presumption, and the court is therefore constrained to hold that the rule applies to this case, and that Abram Elkin is presumed to have died on the last day of the seven years after his departure from this community. That departure was in 1876 and the action was instituted June 13, 1891.

The case is one of very great hardship against this defendanant, it is true, but this court is not here to adjust equities with the natural impulses of man. The court must apply the law. As there is no doubt upon which the court, seeking to find some remedy, could support a verdict for this defendant, the court is constrained to grant the instruction on behalf of the plaintiff, and will instruct the jury presently to return a verdict for the plaintiff. Of course counsel will take an exception.

Mr. Worthington: We take an exception.

The Court: The clerk will take the verdict for the plaintiff for an undivided one-third part of said piece or parcel of ground as claimed in the declaration.

No. 6.

Sup. Ct. Bf. of Hamilton & Colbert

# SUPPLEMENTAL BRIEF OF DEFENDANT.



## Supreme Court of the United States.

OCTOBER TERM, 1899.

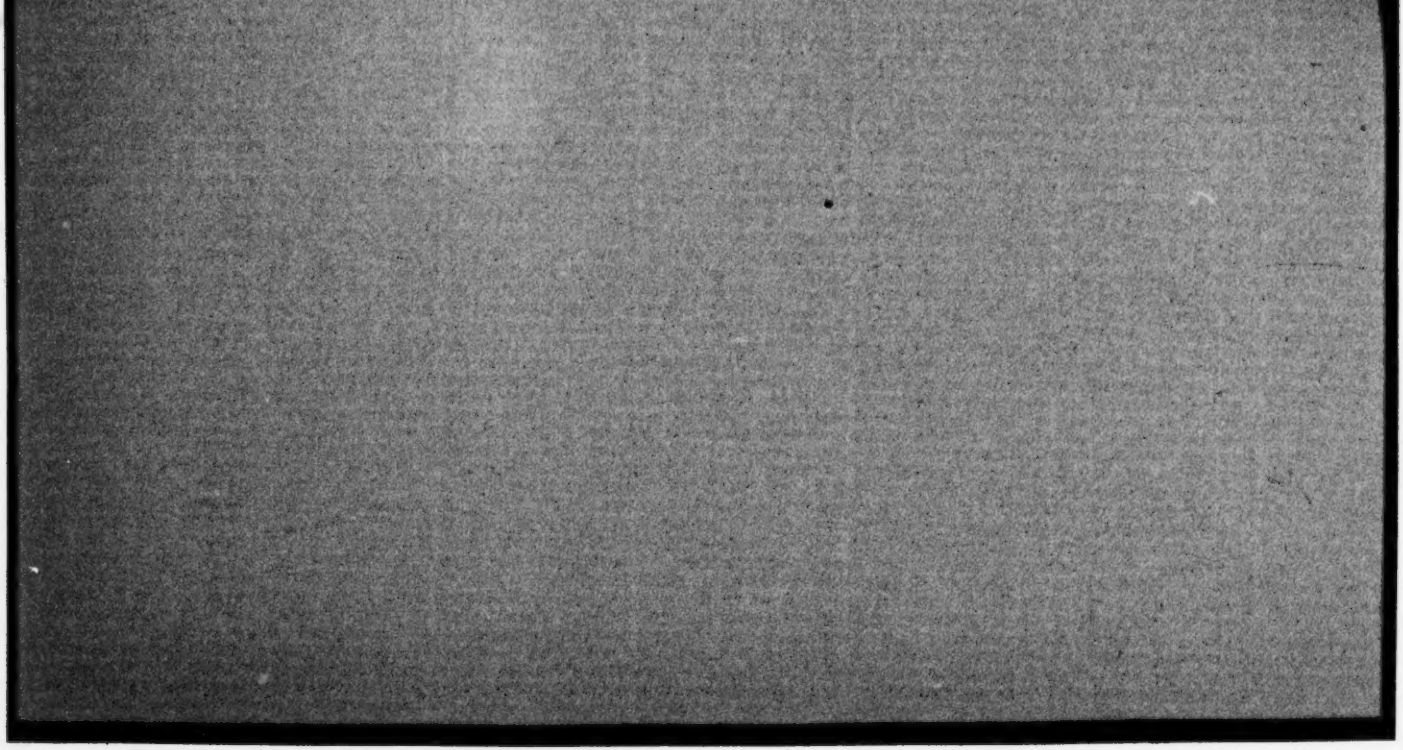
No. 6.

FRANCES REBECCA HAMILTON,
Plaintiff in Error,
vs.
GRACE ABBIE B. RATHBONE.

In Error to the Court of Appeals of the District of Columbia.

A. J.
G. E. HAMILTON & COLBERT,
H. G. MILANS,
*Attorneys for Defendant.*

MILANS, LAW PRINTER, 420 7 STREET, N. W., WASHINGTON, D. C.



# Supreme Court of the United States.

OCTOBER TERM, 1899.

FRANCES REBECCA HAMILTON,
*Plaintiff in Error,*
*vs.*
GRACE A. B. RATHBONE.
No. 6.

## SUPPLEMENTAL BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

This case has been restored to the docket for reargument before a full Bench, and the attention of counsel has been directed by the Court to the consideration of the question of the effect of Sections 727 and 728 of the Revised Statutes of the United States relating to the District of Columbia upon the original act of Congress known as the Married Womens' Act, approved April 10, 1869, and found in 16th Statutes at Large, page 45.

The text of the latter act is as follows:

"SECTION 1. In the District of Columbia the right of any married woman to any property personal or real belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a femme sole, and shall not be subject to the disposal of her husband nor be liable for his debts; but such married woman may convey, devise and bequeath the

same, or any interest therein, in the same manner, and with like effect, as if she were unmarried."

"SEC. 2. And be it further enacted that any married woman may contract, and sue and be sued, in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried; but neither her husband, nor his property shall be bound by any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

The provisions of the Revised Statutes of the United States, relating to the District of Columbia, taken from the original act above quoted, are as follows:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

"SEC. 728. Any married woman may convey, devise or bequeath her property, or any interest therein, in the same manner and with like effect, as if she were unmarried."

"SEC. 729. Any married woman may contract and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried."

"SEC. 730. Neither the husband nor his property shall be bound by any such contract made by a married woman nor liable for any recovery against her in any

such suit, but a judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

It will thus be seen that Section 1 of the original Act of 1869 is divided into two sections in the revision, embracing Sections 727 and 728 of the Revised Statutes. Section 727 of the revision is almost identical with Section 1 of the original act, the only change being that the word "unmarried" is substituted in the revision for the words "femme sole" in the original act. In the original act the power of disposition conferred upon the married woman enabled her to convey, devise, or bequeath "the same," meaning the property referred to in the first portion of Section 1 of the original act—that is to say, property acquired in any other way than by gift or conveyance from her husband. When the revision came to deal with this power of disposition, and sought to incorporate it into an independent section, it was, of course, impossible to use the words "the same," and in their place and stead were substituted the words "her property." Section 729 of the revision is identical with the first portion of Section 2 of the original act. Section 730 variess lightly in phraseology from the last portion of Section 2 of the original act, but there is no change in the substance of the provision. It is contended on the part of the plaintiff in error that the broad language of Section 728 confers upon the married woman the right to convey, devise, and bequeath all classes of property owned by her, whether common law property, her statutory separate estate, or her equitable separate estate. But we respectfully submit that there can be no valid foundation for such a contention, if these four sections of the Revised Statutes to which we have referred are to be read and construed together, in the light of the original

act from which they were taken. Section 727 defines the nature of the property which the married woman may hold as her separate estate; it provides in terms that only such property as she acquires otherwise than by gift or conveyance from her husband shall be her separate estate, and only in such property is her title to be as absolute as if she were unmarried. In all other classes of property and certainly in that class of property which she held as at common law her title was not an absolute one; her husband. in the latter class of property, had his marital rights. He might collect the rents and profits therefrom during the marriage, and after the wife's death he took an estate by the courtesy, provided there was born of the marriage a child capable of inheriting. The wife could not by any act of hers defeat these rights of the husband; she could make no disposition of the property by her own single act, nor could she dispose of the property by her will; she had absolutely no power of disposition by will, and yet, if the construction sought to be placed Section 728 of the Revised Statutes is correct, there is no sense or meaning in the provisions of Section 727 limiting the separate estate of the married woman to such property as she acquired otherwise than by gift or conveyance from her husband. In the same manner, if we turn to the provisions of Section 729 of the revision, we find that the wife's power of contract, and her right to sue and be sued, is limited expressly to her sole and separate property, that is to say, it is limited to property acquired otherwise than by gift or conveyance from her husband, and yet if Section 728 is to be given the effect contended for by the plaintiff in error we would have the anomaly of a married woman being given the power to convey her common law property coupled with an express

inhibition upon her to make any contract to convey the same, or to bind herself by any such contract, or to be sued in respect of it. The whole purpose and scheme of the Married Women's Act, and of the *revision* of the Married Women's Act, was to emancipate the married woman with respect to such property as she owned at the time of the marriage, or which she acquired during the marriage. in some other way than by gift from her husband. The whole object and purpose of the act were gratified when that class of a married woman's property was freed from the control and dominion of her husband, and the act expressly reserves the marital rights of the husband in such property as was vested in the wife by his voluntary gift. To adopt the construction of Section 728 contended for by the plaintiff in error, would be to destroy the husband's vested marital rights in his wife's common law property. If she could convey the same in her lifetime she could defeat his right to the rents and profits; if she could dispose of the same by will, she could defeat his estate by courtesy after death. Indeed this construction would be a radical departure from the scope of the Married Women's Act, and from the intention of Congress in passing it.

As was said by Chief Justice Alvey when this case first came before the Court of Appeals of the District of Columbia for review, "there is nothing to indicate apart from some slight verbal changes or omissions of phraseology, that there was any design to change or extend the original provision of the Act of 1869. Ch. 23, Sec. 1. At most this change of phraseology could but give rise to a doubt as to the meaning of the statute. Before this Act of Congress of 1869, according to the principles of the common law in force in this District, a married woman had no power or capacity to convey the legal title of her

real estate without the joinder of her husband; nor had she any power or capacity to devise her lands by will, being expressly excepted out of the Statute of Wills of Henry VIII. She was and is, however, competent to convey or devise by virtue of a power, and she may convey or devise her sole and separate estate in equity, except where restrained by the instrument creating the estate. Her land held by her as a *feme covert* at the common law was, and is, subject to the marital rights of the husband, and if he survives her after the birth of a child, he is entitled to a life estate in her land by the curtesy."

"Has this common law principle then been so far radically changed by this Act of Congress that the wife, although acquiring the property as at the common law, and not under the statute, may convey by deed or devise the property as if she were unmarried, and thus deprive the husband of all his marital rights? It is not seriously contended that this was the effect of the Act of 1869, as originally enacted. But it is supposed that such is the effect of the change made in the phraseology of the revision. * * * In the revision this section (Sec. 1, of the Act of 1869) of the original act has been broken or divided into two short sections, Sections 727 and 728. And the change of phraseology that has occurred does not seem to be more than is necessary and appropriate in making the new arrangement of the subject-matter of the original section. That, as we have seen, confined the wife's separate power of disposal to *the same property*, that she was authorized to acquire under the statute as separate estate. And we think the wife's power of disposal has not been enlarged or extended by the revision beyond what was given her by the original statute; and that did not apply to or embrace property acquired by gift or conveyance from the husband."

To hold that Section 728 of the revision so far changed the rule of the common law, and so radically changed the provisions of the Act of 1869, as to give the wife the power of disposition with respect to property that she could not dispose of at the common law, or under the Act of 1869, would be to hold that Congress intended to give the wife the power of disposition by deed or will, but gave the wife no means of using the property, no control over it, and no power of contracting with respect to it. It would be to hold that Section 727 gave the husband certain vested rights in his wife's common law property which the wife might instantly deprive him of by the power of disposition conferred upon her by Section 728. Conceding all that can be claimed for the construction contended for by the plaintiff in error, the several provisions contained in the Revised Statutes are certainly inconsistant with each other, and create an ambiguity which justifies recourse to the original act, and when we turn to that act we can readily see how it was that a change of phraseology was made necessary by splitting original Section 1 into two sections of the Revised Statutes.

This court had precisely the same question before it in the case of Kaiser *vs.* Stickney referred to upon page 34 of our original brief, filed herein. In that case Mr. Chief Justice Waite said "It is very clear that the property in question was not under the provisions of Section 727 of the Revised Statutes of the District of Columbia, the sole and separate property of Mrs. Kaiser. She could not, therefore, *convey* it, or contract with reference to it in the same manner and with the same effect as if she were unmarried (Sections 728 and 729), but it was her general property which she could convey by uniting with her husband in a deed, executed in the form required by Sections 450, 451 and 452 of the same Statutes."

In this case of Kaiser *vs.* Stickney, there is no statement of facts, and yet the court undoubtedly had in mind the provisions of Section 728 of the Revised Statutes in disposing of the question, for Section 728 is specifically referred to, and the court specifically holds that the language contained in that section is not sufficient to give to the wife the power of disposing of her general property by deed. It is true that the deeds in the Kaiser–Stickney case were executed before the revision, but the court does not place its decision upon the ground that the Revised Statutes did not affect the case because the deeds were executed before the revision. On the other hand, the court distinctly states that Section 728 does not give a married woman the right to dispose of her general property by deed.

II. We most respectfully submit to the court whether in the consideration of this question it is not material and pertinent to take notice that Abram Elkin held the land in dispute in fee, from 1867, (Rec. p. 17) and on April 29th, 1872, he conveyed it to Fred G. Calvert, and on the same day Calvert conveyed it to Lucy V. Elkin, wife of Abram Elkin. (Rec. p. 12, 13.)

Over two years after that, to wit, on June 22, 1874, the Revised Statutes were enacted into Statute Law (Revised Statutes, Vol., 1, p. 1085, Section 5596.)

Now it would seem clear that as Mrs. Elkin took the property under Act of 1869, took it as her general property, and so held it subject to all her common law disabilities, and subject to all her husbands' vested martial and curtesy rights, whatever the terms or the construction of the Revised Statute her disability to make a valid devise of it remains unaffected.

HAMILTON & COLBERT,
HENRY G. MILANS,
*Attorney for Defendant.*

## HAMILTON *v.* RATHBONE.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 6. Argued November 15, 1899. — Decided December 18, 1899.

The right given to a married woman by section 728, Revised Statutes of the District of Columbia, "to devise and bequeath her property," applies to all her property, and is not limited by the language of a prior act, from which this section was taken, to such as she had *not* acquired by gift and conveyance from her husband.

In the construction of statutes, prior acts may be cited to solve, but not to create an ambiguity.

THIS was an action of ejectment brought in the Supreme Court of the District of Columbia by Grace Abbie B. Rathbone as plaintiff, against Frances Rebecca Hamilton, defendant, to recover an undivided one third interest in a parcel of land of which the defendant Hamilton was then in possession.

Statement of the Case.

The common source of title was one Abram Elkin, who received his deed on July 31, 1867. He was married to Lucy V. Elkin, April 15, 1863.

The plaintiff's chain of title was as follows: Deed from Abram Elkin and wife to Fred. G. Calvert, April 29, 1872; deed of same date by Fred. G. Calvert and wife to Lucy V. Elkin. These deeds were evidently given to avoid a direct conveyance from husband to wife. Both deeds ran to the grantee, "his (or her) heirs and assigns, to and for his (or her) and their sole use, benefit and behoof forever."

Lucy V. Elkin died May 3, 1876, leaving her husband, Abram Elkin, and four children: (1) Grace, the plaintiff, subsequently married to Rathbone; (2) Lucy Caroline; (3) Charles Calvert; (4) Harry Lowry, who died in 1885 at the age of nine or ten years.

Abram Elkin disappeared in June, 1876, and has not been heard of since.

Plaintiff sues for an undivided one third interest as one of the heirs at law of her mother.

Defendant's chain of title was as follows: Lucy V. Elkin, who died May 3, 1876, leaving a will by which she appointed Fred. G. Calvert, her brother, her sole executor. She directed that all her property, real and personal, should be sold, and gave her husband $1000 out of the proceeds of the sale, directing that the residue of such proceeds, after the payment of funeral and other necessary expenses, should be divided equally between her four children. Calvert duly qualified as executor.

In February, 1879, as such executor, Calvert sold the land in controversy to the defendant Frances Rebecca Hamilton, and conveyed it to her by a deed (February 20) which recited that the sale had been made under the power conferred upon him by the will.

A plea of not guilty having been interposed, the case was tried in the Supreme Court of the District by a jury, and a verdict directed for the defendant. On appeal to the Court of Appeals from the judgment entered upon the verdict so rendered, that court set aside the verdict and remanded the

case for a new trial. *Rathbone* v. *Hamilton*, 4 App. Cases D. C. 475.

A second trial was had, and the jury instructed to return a verdict for the plaintiff. From the judgment entered upon this verdict, the defendant appealed to the Court of Appeals, which affirmed the judgment. *Hamilton* v. *Rathbone*, 9 App. Cases D. C. 48. Whereupon defendant Hamilton sued out a writ of error from this court.

*Mr. A. S. Worthington* for plaintiff in error. *Mr. A. A. Lipscomb* was on his brief.

*Mr. M. J. Colbert* for defendant in error. *Mr. H. G. Milans* was on his brief.

Mr. Justice Brown delivered the opinion of the court.

Plaintiff brings ejectment as one of the heirs at law, namely, the eldest of three children, of her mother Lucy V. Elkin, who died May 3, 1876. Defendant relies upon a purchase made by her from the executor of Mrs. Elkin's will. To establish her title, then, plaintiff is bound to show that the property did not pass under the will of her mother, but descended to her heirs at law. The question whether it did so pass depends upon the construction given to certain acts of Congress then in force, relative to estates of married women.

By the act of April 10, 1869, c. 23, 16 Stat. 45, it was enacted:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"Sec. 2. *And be it further enacted*, That any married

woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

Under the first section, the right of a married woman to dispose of her property as if she were a *feme sole* does not apply to property acquired by gift or conveyance from her husband. Did the case rest here, there could be no doubt that Mrs. Elkin took this property from her husband subject to such disabilities as were imposed upon married women by the common law, except so far as the same may have been modified by the statutes of Maryland then in force, *Sykes* v. *Chadwick*, 18 Wall. 141, and the fact that she took title through her brother, Fred. G. Calvert, as an intermediary grantee, did not affect the question. *Cammack* v. *Carpenter*, 3 App. D. C. 219. The deeds from Abram Elkin to Calvert, and from Calvert to Lucy V. Elkin, were made upon the same day, recorded at the same hour of the same day, and both were for the same nominal consideration of five dollars. Add to this the fact that Calvert was the brother of Mrs. Elkin, and the inference is irresistible that it was intended as a transfer from husband to wife. We concur in the opinion of the Court of Appeals that "assuming the facts to exist as they are stated in the record, there is no escape from the conclusion that the property was acquired by gift or conveyance from the husband, though it was through the brother of the wife of the grantor as mere medium of transfer of title. There is no attempt to show that there was any real pecuniary consideration for the deeds, and the consideration stated in them is purely of a nominal character; and all the facts attending the transaction show beyond doubt that the real purpose and design of the husband was to transfer from himself to his wife the title to the property. The passing the title through a third party in no manner changed the effect of the transfer. Though the agency of a third party was

employed, it was no less in legal effect and contemplation a gift or conveyance from the husband to the wife."

Whether under the common law she held this property as her separate estate with power to devise or otherwise dispose of it, as if she were a *feme sole*, is a question which does not arise in view of the statutes then existing, which we think control the case.

In the revision of the statutes applicable to the District of Columbia, (passed in 1874,) the above act of 1869 was rearranged and became sections 728 to 730, as follows:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"SEC. 728. Any married woman may convey, devise and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried.

"SEC. 729. Any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried.

"SEC. 730. Neither the husband nor his property shall be bound by any such contract, made by a married woman, nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

The difference between these sections and the former act is noticeable. By the first section of the act of 1869, the absolute right of a married woman over her property is not given with respect to such property as she has acquired by gift or conveyance from her husband. The final clause of this section reads as follows: "But such married woman may convey, devise and bequeath *the same*," (that is, her separate property, except as above stated,) "or any interest therein, in the same manner and with like effect as if she were unmarried." The first clause of this section is repeated in Rev. Stat. sec. 727,

but the second clause is thrown into a separate section (728), which declares that "any married woman may convey, devise and bequeath *her property* or any interest therein, in the same manner and with like effect as if she were unmarried." Literally, this section extends to all her property, and is not limited to the "same" property described in section 727, and thus excluding that which she acquired by gift or conveyance from her husband. Under the act of 1869, therefore, the power of a married woman to convey, devise and bequeath her property does not extend to such as she acquired by gift or conveyance from her husband, while under section 728 it extends to *all* her property, however derived.

The second section of the act of 1869 likewise reappears without change as sections 729 and 730, and no question is likely to arise with respect to any differences in construction.

The decisive question then is whether section 728 is to be construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it was taken, to show that it was the intention of Congress to limit it to the cases named in such prior act. The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Heydon's case*, 3 Fed. Rep. 76; *United States* v. *Freeman*, 3 How. 556; *Smythe* v. *Fiske*, 23 Wall. 374; *Platt* v. *Union Pacific Railroad Co.*, 99 U. S. 48; *Thornley* v. *United States*, 113 U. S. 310; *Viterbo* v. *Friedlander*, 120 U. S. 707, 724; *Lake County* v. *Rollins*, 130 U. S. 662; *United States* v. *Goldenberg*, 168 U. S. 95.

This rule has been repeatedly applied in the construction of the Revised Statutes. The earliest case is that of *United States* v. *Hirsch*, 100 U. S. 33, in which a section (5440), defining

and punishing conspiracies to defraud generally, was held not to be restricted by the prior act of March 2, 1867, from which the section was taken, which was limited to conspiracies arising under the revenue laws.

The question was again elaborately considered in the case of *United States* v. *Bowen*, 100 U. S. 508, in which it is broadly stated that "when the meaning is plain the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." Rev. Stat. section 4820 enacted that "the fact that one to whom a pension has been granted for wounds or disabilities received in the military service has *not* contributed to the funds of the Soldiers' Home, shall not preclude him from admission thereto. But all *such* pensioners shall surrender their pensions to the Soldiers' Home during the time they remain there, and voluntarily receive its benefits." Bowen was the recipient of an invalid pension, but he *had* contributed to the funds of the Soldiers' Home, and the question was whether that fact withdrew him from the clause which requires pensioners to surrender their pensions to the home while inmates of it. The section was held to be limited to those ("such") who had *not* contributed to the funds of the home, although by the act from which the section was taken, *all* invalid pensioners who accepted the benefit of the home were bound to surrender their pensions to its use while there.

The language above quoted was repeated in *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54, the court again holding that, where the meaning of the Revised Statutes is plain, it cannot recur to the original statutes to see if errors were committed in revising them. To the same effect are *Deffeback* v. *Hawke*, 115 U. S. 392; *United States* v. *Averill*, 130 U. S. 335; *United States* v. *Lacher*, 134 U. S. 624, in which the court said that if there were an ambiguity in a section of the Revised Statutes, resort might be had to the original act from which the section was taken, to ascertain what, if any, change of phraseology there is, and whether such change should be construed as

changing the law. See also *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *United States* v. *Goldenberg*, 168 U. S. 95.

Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. If section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. The word "property," used in section 728, includes every right and interest which a person has in lands and chattels, and is broad enough to include everything which one person can own and transfer to another. The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject.

As bearing upon the proper construction of this section we are also referred to an act approved June 1, 1896, c. 303, 29 Stat. 193, entitled "An act to amend the laws of the District of Columbia as to married women, to make parents the natural guardians of their minor children, and for other purposes." The sections of the act, which are pertinent here, are as follows:

"That the property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and real, personal or mixed property which shall come to her by descent, devise, purchase or bequest, or the gift of any person, shall be and remain her sole and separate property, notwith-

standing her marriage, and shall not be subject to the disposal of her husband or liable for his debts, except that such property as shall come to her by gift of her husband shall be subject to, and be liable for, the debts of the husband existing at the time of the gift.

"SEC. 2. That a married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property, and she may, by a promise in writing, expressly make her separate estate liable for necessaries purchased by her or furnished at her request for the family.

* * * * *

"SEC. 11. That sections seven hundred and twenty-seven, seven hundred and twenty-nine, and seven hundred and thirty of the Revised Statutes of the United States for the District of Columbia, be and the same are hereby repealed."

It will be observed that, by the first section, all the property of a married woman owned at the time of marriage, or which shall afterwards come to her in any manner or from any person, shall remain her sole and separate property, notwithstanding her marriage, thus enlarging the operation of section 727, which limited it to such as she had not acquired by gift or conveyance from her husband. By the second section power is given to her to bargain, sell and convey her property as if she were a married man, but nothing is said about her power to bequeath it. It will be noticed, however, that while sections 727, 729 and 730 of the Revised Statutes are repealed, no repeal of section 728 is made. Evidently Congress understood section 728 to give to a married woman the power to devise and bequeath her property without limitation, and therefore allowed it to stand. If full effect be not given in this case to section 728 as including all the property of a married woman, one of two results must follow: Either that the law of 1896 changed the construction to be given to section 728, although it did not repeal or modify it; or the construction of that section, contended for by the plaintiff, must pre-

vail, and married women are still under the disabilities of the act of 1869, though that act and sections 727, 729 and 730 which reproduced it are expressly repealed. The more reasonable construction is that Congress understood section 728 to give to a married woman the power to devise and bequeath her property without limitation, and therefore allowed it to stand.

Our conclusion is that the property in question passed under the will of Mrs. Elkin. The view we have taken of this subject renders it unnecessary to consider the other questions in the case.

*The judgment of the Court of Appeals must be reversed, and the case remanded to that court with instructions to reverse the judgment of the Supreme Court of the District of Columbia, and to remand the case to that court with directions to grant a new trial.*